R. I. Causes. 1818

MR. HALLETT'S

ARGUMENT

IN THE

RHODE ISLAND CAUSES,

ON THE

RIGHTS OF THE PEOPLE.

Library

University of Pittsburgh

Class

Book

3 1735 037 887 688
1701236

THE RIGHT OF THE PEOPLE TO ESTABLISH FORMS OF GOVERNMENT.

MR. HALLETT'S ARGUMENT

IN THE

RHODE ISLAND CAUSES,

BEFORE THE

SUPREME COURT OF THE UNITED STATES,

January,.....1848.

NO. 14. MARTIN LUTHER vs. LUTHER M. BORDEN AND OTHERS.

NO. 77. RACHAEL LUTHER vs. THE SAME.

BOSTON:
PRINTED BY BEALS & GREENE.
1848.

Digitized by the Internet Archive
in 2010 with funding from
Boston Library Consortium Member Libraries

MR. HALLETT'S ARGUMENT.

Present—Chief Justice TANEY, and Justices WAYNE, MCLEAN, NELSON, WOODBURY, and GRIER. Justices CATRON and DANIEL were unable to sit in the cause, being confined by sickness, and Judge MCKINLEY was not present.

For the Plaintiffs, NATHAN CLIFFORD, Attorney General of the United States, and B. F. HALLETT.

For the Defendants, DANIEL WEBSTER, JOHN WHIPPLE, and ALFRED BOSWORTH.

It being arranged that the two causes should be argued together, Mr. HALLETT opened for the Plaintiffs.

MAY IT PLEASE YOUR HONORS—

The first of these causes comes before this Court by writ of error to the Circuit Court of the United States for the District of Rhode Island, upon a judgment pro forma against the plaintiff in error.

The second is sent up from the same Court upon a certificate of division of opinion between the two Judges.

Both causes involve similar questions and principles, and therefore may with great propriety be argued together, the distinction between them being, that in the first the distinct issue raised is the validity of the People's Constitution, which the plaintiff claims was in force in Rhode Island; and in the second the question is definitely raised as to the force and validity of Martial Law, under which the defendants justify their acts of trespass.

If the new constitution, and laws under it, were in force in Rhode Island, and the old Charter Government rightfully superseded thereby, then the justification of the defendants fails in both cases. If, on the other hand, that constitution was not in force, but the Charter Legislature was in fact the law-making power, yet, if they had not the power to declare Martial Law in the manner they did, or if the act itself, and the proceedings under it, were illegal or defective, or if the defendants have failed to show their authority as subordinates, then also the defence in both cases, but especially in the latter, fails.

The first is an action for trespass to the property of the plaintiff, Martin Luther; the second is an action for trespass to the person of the plaintiff, Rachael Luther.

The facts which appear upon the record, and are to be taken as fully proved, are these:—

In June, 1842, Martin Luther was living in the town of Warren, in the State of Rhode Island, in his own house, (which was also occupied by his mother, Rachael Luther,) and had lived there for nearly forty years. On the 29th of June, in the night time, the defendants, Luther M. Borden, Stephen Johnson, William L. Brown, John H. Munroe, William B. Snell, James Gardner, and John Kelly, are charged with breaking into the plaintiff's

welling house, they being armed with muskets and other dangerous weapons, and in a menacing manner breaking and tearing down the doors, glasses, windows, and furniture, and otherwise defacing and injuring the house.

They are also charged, in the second suit, with a personal trespass upon the plaintiff, Mrs. Luther, an elderly lady of some eighty years of age, by forcibly, in the night time, breaking into her chamber, in which she was sleeping with her maid servant, driving them from their beds in their night clothes, and with bayonets pointed to the breast and body of the plaintiff and her servant, menacing and threatening to stab and kill them, if they did not disclose where Martin Luther was, and detaining them in their night dress, and not permitting them to dress for more than an hour, to their great terror and alarm.

These trespasses are obviously of a highly aggravated character; a midnight invasion of the rights of domicile, and an outrage upon personal security, under circumstances that would call for the highest exemplary damages. The parties in both suits, by these violent proceedings of armed men against them, were compelled to leave the State, in which they could find no protection from law, and became citizens of the State of Massachusetts. It was vain for them to have sought redress in the State Courts of Rhode Island. Hence this was precisely the case for a resort to the Courts of the United States, contemplated by the framers of the Constitution, in order to lift the questions that might arise between citizens of different States above the partial influences of the local tribunals. And therefore this Court has decided, in the United States vs. Judge Peters, [2 Cond. Rep., 202,] and in numerous other cases, that "it remains the duty of the Courts of the United States to decide all cases brought before them by citizens of one State against citizens of different States, where a State is not necessarily a defendant. And again this Court say [in Elliot vs. Piersol, 1 Pet., 340,] that where a Court has jurisdiction, it has the right to decide every question which occurs in the case." "And in a case so brought to this Court on error to the Circuit Court below, this Court *will consider the whole case*, and will decide on the facts appearing upon the record." [Sergeant's Con. Law, 43; 3 Cranch, 174; 9 Wheaton, 733.]

It is under this constitutional rule of its jurisdiction and its duties, that the plaintiffs in the two causes now in hearing ask the interposition and the interpretation of this Court of the last and the highest appeal in matter of law.

They became citizens of Massachusetts, and as such commenced suits against the defendants in the Circuit Court for the District of Rhode Island.

Thus was the history of persecution between Massachusetts and Rhode Island reversed. Two hundred years before, Roger Williams had fled from Massachusetts to find protection against the persecution of *Church* Law; and now Rhode Island drove her citizens back to Massachusetts, to seek redress for outrages committed under the guise of *Martial* Law.

In the Circuit Court below, the defendants set up *a plea in justification*. They admitted that they had committed the trespasses complained of, doing no more damage than they affirm was necessary; but they say they were justified in law, because they were enrolled in a company of infantry, in the town of Warren, under the command of John T. Child, duly appointed and legally qualified to act in that capacity; and that, by order of said military commander, they broke and entered the said dwelling house of the plaintiff in error, in order to arrest and take the said plaintiff, which they aver it was lawful for them to do.

And further the defendants say, that at the time of the alleged trespass, large numbers of men assembled in arms in different parts of said State, made and levied war upon said State, and were attempting the overthrow of the government of said State by military force. That the Legislature of said State, duly and legally chosen and constituted, according to the provisions of the charter or fundamental law, and the ancient and long established usages of said State, and in the exercise of the legislative powers conferred on them by said charter and usages, did enact and establish Martial Law over said State; and that under such authority, and by order of a military commander duly appointed by such authority, the defendants committed the alleged trespass.

To the several pleas of the defendants the plaintiff replied *de sua injuria*, thus denying the truth of the defendants' plea, which issue was joined, and upon this issue came up the question of the validity of the Charter Government, and the acts thereof, under which the defendants justified, and of the new constitution and frame of government adopted by the people of Rhode Island, called the People's Constitution, and the acts and doings of the Legislature under the same.

Thus far the pleadings in both cases are alike; but at this point, with the permission of the Court, I shall leave for future consideration the subject of Martial Law, and proceed to the argument, upon the record in the case of Martin Luther.

In reply to the justification which the defendants set up, under the authority of the Charter Governor and Legislature, the plaintiff contended that the old charter form of government, and the acts of the Legislature under which the defendants justified, were, at the time of such trespass, superseded and abolished by a new form of government, and invalid so far as repugnant to the same; which new form of government was then in force as the funda-

mental law of the State; and that the Legislature chosen by the people, and acting under the said new form of government, and the military and other officers appointed by law, under such legislative power, constituted the actual government of said State; and that acts done under any assumed authority, in opposition to said constitution and laws so established, were unlawful and void.

The question, therefore, was directly between two forms of government, both claiming to be in force at the same time; and upon the construction of law, as to which of these forms of government was in legal existence at the time, depended the issue, whether the defendants had acted under law, or against all law.

Both parties agreed that up to May, 1842, the old charter government of Rhode Island was rightfully in existence. But the plaintiff maintained that it was then superseded by the new government then organized under the People's Constitution, which had been adopted Jan. 12, 1842, to take full effect in the following May.

It followed that if the charter government then ceased, neither the Martial Law, under which the defendants justify the attempt to break into his house and seize Mr. Luther, nor the military commission and the military orders of their commander, were of any avail.

Plainly, then, the rights of the parties in this cause can only be decided by deciding that issue *distinctly* and *directly*; and in the judgment of the plaintiffs' counsel, and I may add of the learned Judge since deceased, who framed the instructions upon the record, that issue was intended to be brought, and is brought before this Court in such form that it must be met, and must be passed upon in the indispensable exercise of the ordinary judicial functions of this high tribunal.

I do not say this, may it please your honors, as if there were or could be any doubt that this is the issue here, or that this elevated tribunal will meet it as decidedly and calmly as if it involved the simple question of title to a piece of land, instead of the people's title to their great right of self-government.

But I am not without apprehension that the very eminent counsel employed on the other side will aim to get round the issue, rather than to meet it, and will labor rather to withdraw the cause from your honors than to permit it to be decided on its merits.

They cannot and will not deny the jurisdiction over the whole cause, but their brief clearly indicates that they intend to treat it as a political and not a judicial question, and therefore, though within the jurisdiction, nevertheless not within the rule of decision.

I apprehend, however, that it will be found impracticable to evade the true issue raised upon the record in that form, and that no ingenuity of counsel can satisfy this Court or the common mind, that if the pretended Legislature that enacted Martial Law, and the pretended military officers who held commissions and acted under it, were in fact and law no Legislature and no officers, there can be any possible justification of breaking into the plaintiff's house, under an utterly void authority.

And I trust, with respectful deference, that however reluctant this Court may be to decide incidentally between the validity of the two governments in Rhode Island, both claiming to be the true one, that nevertheless they will hold, as was held by Chief Justice Marshall, in the much more delicate and exciting case of the imprisoned missionaries, in Worcester vs. the State of Georgia, that the law "imposes on this Court the duty of exercising jurisdiction in this case, and this duty, however unpleasant, cannot be avoided."

And to the same point, in Owen vs. Hall, [9 Peters, 607,] this Court say "the Supreme Court of the United States is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States."

What was the jurisprudence of Rhode Island to govern this case, is the precise question, and no matter whether it be a statute law or a fundamental law. "The Supreme Court may decide all cases between individuals, citizens of different States, and these cases in some form or other involve every kind of State power and sovereignty." [9th Dane's Ab. Appendix, 52.]

Strange then would it be, if this Court can construe State constitutions, as in the case of Groves vs. Slaughter, [15 Peters, 450,] and the like, and cannot inquire whether they exist, have been changed, or are in force as the supreme law for the time covered by the matter in issue to be determined.

This would be to allow conclusions to be drawn, but to deny the power of the Court to inquire whether the premises exist.

The issue here is, what was the subsisting form of government in Rhode Island, to cover the trespass.

Such being the issue, there must be some way of proving which form of government, (when under both conflicting laws are passed,) was in force at the time; in other words, to show what is the law to govern the case.

Ordinarily the Court will take notice, judicially, of the constitution and laws of a State. But this is only where their existence is not denied, and their repeal or nullity is not affirmed.

When this is disputed, it must be determined like any other issue of law and fact. In every case of the adoption of a new constitution by a State, which is constantly occurring,

there must be a point of time when the old government expires and the new takes effect; and whenever this becomes matter of doubt or denial before the Court, or whether in fact the new form superseded the old, the Court must determine that issue, before they can decide the case.

The plaintiff, therefore, in this cause, proceeded to prove that the justification of the defendants under the old government was unavailing, because that government was superseded by a new constitution and an Executive and Legislature chosen under it.

Possibly he may have offered to prove more than was absolutely necessary; but the question is, was what he offered to prove sufficient to establish the legal fact of the superseding of the old by the new frame of government in Rhode Island.

It all depends on this, because there is and can be no controversy, that if in fact the People's Constitution was the law of Rhode Island in June, 1842, the defendants totally fail in their justification.

To prove that it was in force, the plaintiff proceeded to put in evidence before the Court below, all the preliminary steps which led to the adoption of the People's Constitution and its adoption the 12th of January, 1842, by an actual majority of all the white male adult inhabitants of Rhode Island, then living in the State, and also by a majority of the whole number of the resident legal voters or landholders, who held the right to vote under the charter government. He also showed that there was no existing provision in the then existing frame of government in Rhode Island for calling a Convention to make a constitution, or for amending the frame of government. In short, the proof went to establish the fact that every form usual or proper to be observed, or that ever had been observed, in framing a constitution in a State of this Union, by a clear majority of the people and of the legal voters, had been observed, in all respects, with the single exception that the old Legislature of Rhode Island, which was chosen by a minority of landholders, who refused to extend suffrage to any person but a landholder, would not and did not pass an act requesting or permitting the people to elect delegates to a Convention to make a constitution; and refused, after the constitution was adopted, and a new government established under it, to surrender the old government to the new organization, but held out against it, and by the promised aid of all the military and naval forces of the United States, at the command of President Tyler, finally succeeded in putting down the new government by force, or rather prevented the Legislature reassembling, and successfully resisted the execution of its laws.

Upon this state of facts, the counsel for the plaintiff requested the Circuit Court for Rhode Island (composed of Judges Story and Pitman,) to instruct the jury "that the constitution and frame of government so adopted and established was and thereby became the supreme law of the State of Rhode Island, and was in full force and effect as such, when the trespass was committed by the defendants. That a majority of the free white male citizens of Rhode Island, of twenty-one years and upwards, in the exercise of the sovereignty of the people, through the forms and in the manner set forth in the evidence, (and especially in the absence of any provision for amending, altering, reforming, or changing the old frame of government,) had the right to *reassume the powers of government*, and establish a written constitution and frame of a republican form of government; and that having so exercised such right, the pre-existing charter government, and the authority and assumed laws, under which the defendants claimed to have acted, became null and void, and were no justification of the trespass committed by the defendants."

This was the plaintiffs' reply to the excuse set up by the defendants, and if admitted by the Court, it left them without justification.

On the other hand, the defendants offered to prove the existence of the charter government from 1663, when granted by Charles the Second; its modification by acts of the Legislature after the American Revolution; and its continuance, notwithstanding the acts of the people in framing a written constitution, as before set forth. They also offered to show that the Charter Assembly, on the 25th of June, 1842, passed an act establishing Martial Law, as follows:—

"*Be it enacted, &c.* The State of Rhode Island and Providence Plantations is hereby placed under Martial Law, and the same is declared to be in full force until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State."

They also offered to prove that the defendants, being members of a military company in the town of Warren, under the command of John T. Child, were ordered by him to arrest the plaintiff, Martin Luther, who was supposed to be concealed in his dwelling house, and in pursuance of that order, they broke into the house and searched the same.

The question of justification under the pleadings was the issue that was made up between the parties. There was no trial by jury, and no argument on either side, (in the case of Martin Luther,) but upon the suggestion of the late Mr. Justice Story, it was resolved into

matter of law, " and the Court *pro forma*, and upon the understanding of the parties to carry up the rulings and exception of the said Court to the Supreme Court of the United States refused to give the instructions asked for by the plaintiff, or to admit in evidence the facts offered to be proved by the plaintiff, but did admit the testimony offered to be proved by the defendants, and did rule that the government and laws, under which they assume in their plea to have acted, were in full force and effect as the frame of government and laws of the State of Rhode Island, and did constitute a justification of the acts of the defendants, as set forth in their pleas."

The instructions were so given and refused, in order that the questions involved in the cause might be originally presented in full bench here, with no one of the Justices having previously adjudicated upon them ; and this issue is now here, in the nature of an appeal upon the matters of fact and law set forth in the record, the facts offered to be proved by the plaintiffs being taken and admitted, in this hearing, as fully proved.

Thus, may it please your honors, in its ordinary aspect, this cause is merely an action of trespass in common form between citizens of two different States brought in the Circuit Court for Rhode Island, and rightfully before this Court by writ of error. The parties being citizens of different States upon the record, the jurisdiction cannot be questioned under the constitutional powers of this Court.

Upon this statement of the issue, therefore, we contend that it will become indispensable (as it seems to us,) for this Court, in order to determine this case, to decide, incidentally to the merits, whether the People's Constitution was in force in Rhode Island as the fundamental law of the State ; and hence the importance of this cause, as presenting, in fact, a judicial test, before the highest tribunal in the land, whether the theory of American free government for the States of this Union is available to the people in practice ; in short, whether the basis of popular sovereignty is a living principle, or a theory, always restrained in practice by the will of the law-making power, and therefore subject and not sovereign.

In this view of the aspect of this cause, it becomes necessary to go back to fundamental principles, to determine which was the existing form of government, which was the Legislature, and what were the laws in force at the time of the trespass. This is apparent from the fact that by the pleadings the defendants admit they have committed a trespass, but justify their acts under the authority derived from the Charter Assembly and the commissions and orders of military commanders, deriving their sole power from that source.

Now, in May, 1842, a Legislature, chosen by the people, under the People's Constitution, were in actual session, enacting laws with all the forms of a constitutional government, and after transacting the business, they had adjourned, to meet again in July.

In June, 1842, the body calling itself the General Assembly of Rhode Island, chosen, as we contend, unlawfully, after the adoption of the People's Constitution, and after the election of general officers and members of the Legislature under that constitution, held a session, as if it were still the law-making power of the State ; and on the 25th of June enacted Martial Law ; and on the same day commissioned John T. Child as a military officer—by whose order to break into the plaintiff's house, the defendants justify that act.

Here are two conflicting powers that could not lawfully co-exist, and either the People's Constitution and government, and the Legislature chosen under it, were all unlawful, and in fact *violence* against the old government, or if the people had any right to make a constitution, without the consent of the Landholder's Legislature, then the charter government was superseded, and Martial Law and the commission of John T. Child were null ; and in fact the whole authority under which the defendants justify was insurrectionary void, and constitutes no excuse for a violation of the right of the plaintiff to be protected in his property and person against seizures and searches, except under warrant issued by a lawful magistrate.

Here, then, are two bodies of men, both claiming to have been, at the same time, the law-making power of a State. An act passed by one of them is repealed by the other, and this act is called in question in a suit in the Courts of the United States ; citizens of that State and a citizen of another State.

This is precisely the issue over which the Constitution gives jurisdiction to the Courts of the United States, to wit : in all " controversies between citizens of different States."

How can it be tried, except by trying the validity of the assumed law and authority which the defendants set up as their justification, and which the plaintiff denies ?

How can that validity be tried, without tracing back the law to the assumed law-making power, and that power to the source from whence it derived its authority ? In short, it cannot be decided which law was valid, without finding, first, who made the alleged law, and second, whether it was a lawful subsisting Legislature.

The plaintiff sues for a trespass.

The defendants, admitting the trespass, justify under certain acts of the Charter Assembly of Rhode Island, and the commissions and orders of military commanders, deriving their powers from that source. The plaintiff avers that this power and these acts were supersed-

ed and repealed by paramount authority, and were therefore void. The question is, which is valid and which must yield. And so far it is a conflict of authority upon the judicial construction of the power to pass such acts and issue such commissions and orders and their force and effect upon the parties on the record.

This is the general scope of the inquiry in the argument, but it is after all only determining what is the law to govern this particular case. The plaintiff has suffered injury, for which the law gives redress. The defendants admit the damage, but deny the injury, on the ground that the common law, under which he claims redress, was set aside, in this particular case, by other and paramount authority.

We deny his intervening law or authority, and the matter resolves itself into the construction of the law upon the facts presented on both sides. Which was and which was not the law? And however general and broad may be the principles, and whether a conflict as to the fundamental law or a statute law, the case is exclusively one between citizens of two States, to be settled by the laws of the State in which the action was brought, in deciding which this Court incidentally is to say what were the laws of that State governing this case, and who had the power of making the law, and giving the license claimed by the defendants.

I have been thus particular in stating the issue, and the points of decision it involves, because in the defendants' abstract of the case it is assumed, and will doubtless be argued, "that the Courts of the United States can recognize no other *government* in the States of this Union, except the one represented in and recognized by the Congress of the United States;" and hence it is to be inferred that this Court can only recognize the old charter government of Rhode Island.

If this proposition of the defendants can have any meaning, it must be intended that the judicial power, in its decisions, must follow the political power; a maxim which no lawyer will deny.

But this maxim of public law relates only to the functions of the general government in its intercourse with foreign governments, and in the exercise of the treaty-making power, by the forms of recognition of independent States, and the establishment of boundaries and diplomatic relations.

Numerous and uniform decisions of this Court (which will hereafter be cited,) settle this point.

It is without precedent and without meaning, if attempted to be applied to the relations of a State to the Federal Government, under the Constitution.

The Executive power can neither recognize nor repudiate, can neither make nor unmake a State of this Union. The President cannot enforce the laws of a State, nor determine what are or what are not the laws of such State. He can only execute the laws of the United States, within the several States.

And in respect to the relations of Congress to the sovereignty of a State, as a member of the Confederacy, it has but a single function to exercise, under the Constitution, namely, "new States may be admitted by Congress into this Union."

When a State is in the Union, as were the original States that framed the Constitution, or is admitted by Congress, the whole political power is exhausted.

There is the State and there it remains, with no power in Congress to exclude it from the Union or to question its existence as a State, and with no authority to pass upon its form of government, or to approve or condemn any changes of that frame of government, which may be altered at will, in the exercise of the power of inherent sovereignty, in determining what shall be the local institutions and the organic law of such State; provided that they are not repugnant to the Constitution of the United States. And even that is to be determined, not by the political power of Congress, but by the judicial power of the Supreme Court, whenever the question of repugnancy arises in a case for its decision.

The State, therefore, once a State, is always a State, whatever may be its changes in the frame of government, provided the form of government be republican. This is the only possible limitation. "The United States shall guarantee to each State in this Union a republican form of government."

But even this, it has been argued, is an unoccupied power, because Congress has prescribed no form of law under which and by whom it is to be exercised. It may well be considered as a power which executes itself, but whether it be so or not, it is conclusive for the purposes of this case, to show that the change of the government of a State is no change of the State, in its federal relations.

When this objection touching the power of guarantee was urged against the adoption of the Constitution by its opponents, as sanctioning an interference by Congress with State rights, in respect to their local institutions and organic forms, Mr. Hamilton said, in the 21st No. of the Federalist:—

"The inordinate pride of State importance has suggested to some minds an objection to the principle of a guarantee in the Federal Government, as involving an officious interfer-

ence in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union; and can only flow from a misapprehension of the nature of the provision itself. It would be no impediment to reforms of the State Constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished." [P. 78, Ed. of 1845.]

To the same point, Mr. Madison, in No. 43 of the Federalist, says (p. 75) :—

"The authority extends no farther than to a guarantee of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute *other republican forms*, they have a right to do so, and to claim the federal guarantee for the latter."

How, then, is Congress to "*recognize* the existence of a *government* in the States of this Union," which the defendants lay down with seeming gravity, as if it were a proposition to be argued?

The only test they propose of such recognition is "the government represented *in* the Congress of the United States."

The answer is, that the State, and not the government merely, (that is, the old or new frame of government,) is represented in Congress. That body can judge of the election and return of its members, and if there were two sets of members chosen, it might determine under which form they were legally elected. But this would determine nothing judicially. If it did, the House might admit under one authority, and the Senate under another, and thus there would be two governments in the same State, recognized by Congress (as far as the two Houses can act at all,) at the same time!

Another and manifest absurdity is involved in this crude proposition of the defendants. If the people of a State had changed their constitution and frame of government, just after the election of Senators and Representatives, that constitution could not take effect, until two or six years after its adoption, when new members should be chosen under it, and be *recognized* by Congress. Hence, if there be anything in the defendants' proposition, the Supreme Court of the United States could not recognize the existence of the new government, and the laws under it, until members of Congress had been returned and admitted!

Upon this theory, New York is in part now out of the Union, by the change of her government in 1846, and Rhode Island has scarcely got into it, and for a season at least was an alien, until her Senators and Representatives were all chosen under her existing constitution of 1843, and admitted to their seats.

I then submit the preliminary proposition, that upon the pleadings and the record of this case, the Court cannot determine the issue, whether a trespass was or was not committed, without first deciding what were the constitution and frame of government in force in Rhode Island at the time.

And with this view, and under the permission of the Court, I shall proceed to open this cause upon the broad basis of this argument, in its full force and extent, covering the whole ground of *rightful changes of government by the people of the States of this Union.*

These preliminary suggestions embrace within the issue three general propositions.

1. That the assumed authority, legislative and military, and the acts and orders under which defendants justify, are invalid and insufficient.

2. That the issue was properly before the Court below, and it is necessary for this Court to pass upon it, in order to determine the rights of the parties on the record in this cause.

3. That it is a judicial power, and not a political power, which the Court is called upon to exercise in applying the rule of decision that is to govern this case.

The burden of proof is on the defendants to show their justification, but the plaintiff, doubtless, must show, at least, so far as to set aside the authority of the defendant's plea, that the new government had superseded the old form.

I propose, therefore, to maintain, in the argument, the following points, which were ruled against the plaintiff, merely formally, in the Court below.

1. That the People's Constitution was in force in Rhode Island in June, 1842.

2. That the Legislature chosen under it was the law-making power.

3. That consequently, the pre-existing Charter Government was superceded; and

4. That the plaintiff need show such change of government only so far as the justification the defendants set up, under the first, is concerned.

In order to sustain these propositions, we must first establish the great basis upon which alone they can rest in the American system of government, viz. :—

1. That the majority of the people, or of the legal voters of a State, have a right to establish a written constitution.

2. That this is pre-eminently their right, in the absence of any provision in the existing frame of government for its amendment.

3. That this right is independent of the will or sanction of the Legislature, and can be exercised by the right of eminent sovereignty in the people, without the form of a precedent statute law.

In maintaining these positions, I shall not assume to rely upon my own opinions, for it would manifestly be presumptuous to attempt to establish before this tribunal any fundamental theory of government sustained only by the opinions of counsel. This is, of all causes, not one to be carried on either side by eloquence or assertion. It is, pre-eminently, a case for argument, authority, and constitutional construction.

To present this important cause before your honors, divested of the false impressions that may have been attached to it, I beg permission, at some length, to go into the history of the origin, causes, and details, of the first adoption of a written constitution by the people of Rhode Island, in 1842.

I deem this course essential to a just appreciation of the merits of the cause of popular sovereignty in Rhode Island, and of the men who took the lead in it, with equal right, and with more wrongs, than our revolutionary fathers had to justify and impel them in their work of abolishing old and establishing new forms of government.

I know that this has been slurred as the "Dorr rebellion," and held up to moral condemnation as a mere riotous attempt of lawless men to seize upon and plunder the public property, and to overturn the government by force, without the forms of law.

Hence the opponents of this cause have usurped the title of the party of "law and order," and have proclaimed Governor Dorr, and the Executive and Legislative government chosen by the people, as rebels and insurrectionists.

In this presence, the crimination or recrimination of parties or partizans finds no place. To the extent of my ability, therefore, I shall seek to present the issues alone that belong to the argument. I shall censure or asperse no man or set of men, and I only ask in return, that on the other side the same rule may be observed by one of the distinguished counsel for the defendants, whose local feelings, if indulged, may here as elsewhere, impel him in the argument, to sink the dignity of the advocate in the personal resentments of the individual.

Turning, then, to the record of this case, I will first consider—

What did the plaintiff offer to prove, in order to establish a change of government in Rhode Island, and what is the legal effect of that proof?

The case which makes this inquiry indispensable to the issue, stands thus :—

The plaintiff alleges a civil injury, which is admitted, but the defendants justify, as military men, under the orders of a military commander. Their authority must be traced to a legitimate source or power, or it fails to justify. The plaintiff contends that there was no authority for such military process, and this goes back to the fact as to the validity of the statute law and the fundamental law, upon which both parties claim to stand.

The defendants justify specially, and so far take the burden of proof.

To do this, they allege that the Executive, Legislative, and Military power of the State was at that time in a certain body of men then acting under the charter, laws, and usages of the State.

We deny this, and say it was in another body of men, acting under a written constitution, which had become the supreme law of the State, and superseded the old forms.

It is not the question, what was the State of Rhode Island. The State is permanent, unchangeable. The constitution is the form of government, and may be changed in form, as well as a statute, if rightfully done.

But who were the men acting under forms of law, clothed with the power to make and enforce laws, and what was the law at the time of the admitted trespass, and the authority that alone could justify defendants' acts ?

They say there had been no change of the organic law of the State, and that the same forms of organization existed at the time of the trespass, after as well as before the adoption of the People's Constitution.

We offer, then, to show, not a *revolution by force*, but a peaceful change of the organic law, and the exercise of government under it, as valid and effective as the change of a mere statute law, or the whole body of a code of laws, by a Legislature.

Now how do we show it ?

By the peaceful forms of Conventions of the people, and by the votes of a majority of the male adult people and of the legal voters of the whole State, but without any statute law authorizing the meetings and prescribing the mode of voting.

The defendants' counsel will contend that this last deficiency in the process renders the whole void ; and on this single point, I apprehend, must rest the whole strength of their argument.

To test it thoroughly, it is necessary to investigate the history of government in Rhode

Island, in order to apply the rule of law that shall determine where the source of power was, at the time of the change in government under the new constitution.

This will embrace three branches of what may be designated as the historical part of the argument, viz: 1st, the history of government before the Revolution; 2d, the changes after the Revolution; and 3d, the proceedings of the people in framing and adopting the first written constitution in 1842.

Government before the Revolution.

This was colonial, and was derived from grants by the King or Parliament by Great Britain.

The first charter of 1643 was granted under authority of the Parliament of England, empowering Robert, Earl of Warwick, and Commissioners associated with him, to govern the Islands and Plantations upon the coast of America, by virtue of which the Earl of Warwick and his associates granted unto the *English inhabitants* of the towns of Providence, Portsmouth, and Newport, a free charter of civil incorporation and government, that they may order and govern their plantations in such manner as to maintain justice and peace among themselves and towards all men with whom they shall have to do.

And in this grant the said Earl of Warwick, as Lord High Admiral, &c., gives to the *aforesaid inhabitants* a free and absolute charter of civil incorporation by the name of the incorporation of Providence Plantations, together with full power and authority to govern and rule themselves, and such others as shall hereafter inhabit any part of said tract of land, by *such a form of civil government* as by a *voluntary consent of all* or the *greatest part of them*, shall be found most serviceable in their estates and condition, and to that end to make and ordain such laws and *constitutions* as they, or the *greatest* part of them, shall by free consent agree unto—conformable to the laws of England so far as the nature and constitution of the place will admit, reserving the final controlling power to the grantors. [See Charters of Rhode Island, and Leg. Doc., p. 3.]

This gave the power to a *majority of inhabitants* to frame constitutions, and established "a rule of the people." [Address of People's Convention, p. 37, in 1834.]

In March, 1655, Oliver Cromwell, by letter to the president, assistants and *inhabitants* of Rhode Island, together with the rest of the Providence Plantations, directed them to proceed in their government according to the tenor of their charter. [Ibid. p. 5.]

In 1660, on the restoration of Charles the Second, John Clark, late *inhabitant* of Rhode Island, then residing in Westminster, was appointed, by the principal Court of the colony, their agent, to secure a continuance of their just rights and privileges. [Ibid. p. 7.]

He obtained the charter of 1663 from Charles the Second, for "the purchasers *and free inhabitants* of Rhode Island, and the rest of the colony of Providence Plantations." This is the charter which the defendants set up.

It secured religious freedom to *the people and inhabitants* of the colony—that *no person* within the colony should be molested for any differences in opinion in matters of religion.

It ordained that William Brenton and others, and all "such others as now are or hereafter shall be admitted and made free of the Company and Society of the said colony, shall be a body corporate and politic."

That for the managing of the affairs of said company, there should be a Governor, Deputy Governor, and ten Assistants, to be elected out of the freemen of said company; and twice a year, or oftener if requisite, the Assistants, and such of the freemen of the company, viz: six for Newport, four for Providence and Warwick, each, and two for each other town or place, elected or deputed by the major part of the freemen of each town, were to meet at Newport, to advise and determine about the affairs of the company.

With power to choose and appoint so many other persons as they shall see fit, and shall be willing to accept the same, to be free of the company, and to elect such officers and make such laws, *statutes, forms and ceremonies* of government, as seem meet for the government of the lands and of the *people* that do or shall inhabit or be within the same, provided such laws and constitutions be not repugnant, but as near as may be agreeable, to the laws of England, considering the nature and constitution of the people there, and to regulate the manner of all elections to office. *It also secured to every subject of England within the colony, or who should go there to inhabit, and their children born there, or on the sea, all liberties and immunities of free and natural subjects within any of the King's dominions, to all intents and purposes.*

At this time there were about 2500 inhabitants. [2 Bancroft's Hist., p. 64.]

The charter was held up to all the people at Newport, and approved by them.

I have cited the substance of these two charters, in order to show that there was no exclusion in either of them of the political rights of the inhabitants. The first expressly gave the power to "*a majority of inhabitants* to frame constitutions," and was declared to be "a rule of the *people*," and not of the landholders.

The last charter was more in the form of a close corporation, and new members were to be admitted only by the voice of the company.

The corporation was also empowered to make laws and constitutions for the government of the people, *provided* they were not repugnant to the laws of England. And upon this provision, it is only necessary to say, in passing, that the power, whatever it was, existed only so long as the corporation existed, under its grantor. Upon that relation ceasing, as it did by the Revolution, and the disclaimer of allegiance to England, a new source of power came in. A corporation never could subsist after the extinction of its grantor, unless it became independent, and then it must have a new source of power within or without itself.

To affirm that the power in the charter to make laws or constitutions conferred a power over the people, which remained after the Revolution, would be to affirm the self-existence of a corporation without a grantor, and a republican government without a people.

But there is one provision in that charter which affirms the equal rights of every inhabitant, viz.: that every subject of England, in the colony, or who should go there to *inhabit*, and their children, should enjoy "*all liberties and immunities, to all intents and purposes, of free subjects, within any of the King's dominions.*"

Hence, if any power given by the charter was inherited therefrom by the landholders of Rhode Island, as some pretend, the people also inherited under it all liberties and immunities belonging to the whole community, as "the free inhabitants of Rhode Island."

The whole of the difficulties in Rhode Island between the landholders and the people have grown out of the restrictions by the former upon the political rights of the latter. In this respect there was a constantly increasing usurpation.

The limitations of suffrage were all, in fact, departures from and violations of the spirit of the charters.

At first the whole people assembled, in mass, at Newport, and enacted laws. It was a democracy without representation. In 1663, the voters who could not attend in person gave their votes for general officers in town meeting, and those votes, called *proxies*, were sent to the Assembly to be counted. This is the origin of the term *prox* being used in Rhode Island to designate the *ticket* which contains the names of the candidates. In 1760 all voters were compelled to give their votes in their respective towns.

In 1663–4, we find the first limitation of suffrage, and with it a monstrous outrage upon the charter, and upon the distinguishing principle of Roger Williams, the founder of religious freedom.

In that year, the Assembly expressly excluded all *Roman Catholics* from the exercise of political rights.

Some doubt has been raised as to the precise date of this enactment, whether in 1663 or 1719, but it appears in the first published revision of the laws, in 1730. Chalmers, chief clerk in the Plantation Office, in England, who had access to the original documents, affirms it to be of the date of 1664.

Mr. Eddy, the late learned Secretary of State, examined the colonial records, and doubted the existence of this act till 1719. He also suggested the possibility of an interpolation, but could find no evidence to support it. All that can be urged, in palliation, may be found in Knowles's Life of Roger Williams, p. 321. [See also Address of the People's Convention, 1834, p. 42, and R. I. Charters and Leg. Documents, p. 23.]

The evidence I hold in my hand is conclusive as to the bigotry of the Assembly under the charter. It is a copy of two acts, certified by Mr. Henry Bowen, Secretary of State. The first is a copy of an act, first published in the first edition of Colony Laws, in 1730, entitled "An act for declaring the rights and privileges of His Majesty's subjects within this colony, passed by the General Assembly, holden at Newport, on the first day of March, 1663."

The second section provides—

"That all rights and privileges, granted to this colony by His Majesty's charter, be entirely kept and preserved to all His Majesty's subjects residing in or belonging to the same—and that all men professing Christianity, and of competent estates, and of civil conversation, who acknowledge and are obedient to the civil magistrate, though of different judgments in religious affairs, (Roman Catholics only excepted,) shall be admitted freemen, and shall have liberty to choose and be chosen officers in the colony, both military and civil."

This disqualification was not removed until the 24th day of February, 1783, seven years after the Revolution

It was then enacted—

"That all the rights and privileges of the Protestant citizens of this State, as declared in and by an act *passed the first day of March, A. D. one thousand six hundred and sixty-three*, (1663) be and the same are hereby extended to *Roman Catholic* citizens; and that they, be-

ing of competent estates and of civil conversation, and acknowledging and paying obedience to the civil magistrate, shall be admitted freemen, and shall have liberty to choose and be chosen civil and military officers within the State, any exception in said act to the contrary notwithstanding."

This last recited act of repeal affirms beyond all doubt the existence and the date of the preceding act, and thus we have the fact, that in the face of the first principle of her charter and her founder, the Assembly of Rhode Island utterly disfranchised citizens on account of their religious belief, and this act remained openly published in her statute books from 1730 to 1783, a period of fifty-three years.

With this starting point in the disregard of religious freedom by the Rhode Island Assembly, we shall be less surprised at the subsequent violations of the civil rights secured in the charter, by the usurpations and encroachments of the same body, from 1663 down to 1842, when they passed what has been called the "*Algerine act*," under which Martin Luther, the plaintiff in this cause, was actually imprisoned six months, and compelled to pay a fine of five hundred dollars, for the *crime* of peacefully presiding as Moderator in a town meeting in Warren, under the People's Constitution !

[Mr. Bosworth—He was imprisoned but not fined !]

Mr. Hallett—The learned counsel is mistaken. That act, which I deny ever was law, imposed both penalties without mitigation, and the Supreme Court of Rhode Island sentenced Mr. Luther to both. He suffered the imprisonment, and the friends of freedom in Rhode Island and other States raised the fine by subscription, in which no man, I believe, was allowed to give over ten cents, and that money has gone into the Treasury of Rhode Island.

Thus early began the restriction of civil and religious rights. In 1665 the Quakers were laid under certain disabilities.

In the same year, 1665, the qualifications for voters were all men of competent estates and civil conversation.

In 1666, "freemen of the towns as should be by the towns judged deserving." This was another early departure from the charter, which gave the power of admission to the company and not to the towns.

In December, 1686, Sir Edmund Andross, agreeably to his order from King James, dissolved the government and assumed the administration. The revolution of 1688 put an end to his power, and the colony, not without interruptions, resumed its charter. [See 1 Elliot's Debates, Ed. of 1836, p. 23 ; History of Colonial Government.]

Not until *after* this did the Assembly impose a landed qualification.

In 1723, the first land qualification was enacted, viz. : freeholders of lands of 100 pounds value, or 40 shillings rent, or the oldest son of such freeholder. In 1729, raised to 200 pounds and 10 pounds per annum. In 1742, an act was passed to increase the restrictions, and so little did the Assembly know of their own charter, that in the preamble to this act they actually recite, in justification, a "whereas that it is provided in the *charter* that none shall be admitted freemen but such as are of competent estates," &c., when, in fact, there is no such provision, nor anything like it, in the charter ! [See Leg. Doc., p. 28.]

In 1746, the land qualification was increased to 400 pounds, or a rent of 20 pounds, the candidate to stand propounded in open town meeting three months.

In 1762, the value of the land required was reduced to 40 pounds and a rent of 40 shillings ; and in 1798, it was fixed at 134 dollars, clear of all incumbrances, and a land rent of 7 dollars, and in this form it remained until the adoption of the People's Constitution, in 1842.

The Revolution in 1776.

This review brings us up to the period of the Revolution, in 1776. That movement was the act of the whole people.

And here I can, with pleasure, present a pre-eminent claim on the part of Rhode Island, over all the colonies, to the first authentic act dissolving all allegiance to Great Britain.

May 4th, 1776, the Assembly passed an act repealing an act for the more effectually securing to His Majesty the allegiance of his subjects, and altering the forms of commissions, of all writs and processes in Court, and of the oath prescribed by law. [Charters and Leg. Doc., p. 31.]

In May, 1776, the arms of the State first appeared on the Schedules, and concluded with God Save the United Colonies.

This was a bold act for that little colony, for at one blow it abolished the charter and with it all fealty to the Crown.

Where did the Assembly, the creature of that charter, get the power to set up political organization for themselves but from the people, and by the same right of popular sovereignty which was exercised by the people when they adopted their constitution in 1842 ?

Rhode Island preceded Virginia in this act of independence by twelve days. Virginia pro-

posed the first Continental Congress in 1774. After the Colonial Legislature had been dissolved, and the Governor refused to call them together, the deputies of the House of Burgesses assembled in their private capacity, in Convention, and assumed the powers of government as one body.

August 26, 1775, the deputies, in General Convention, declared that a causeless, hasty dissolution of the Assembly, by Lord Dunmore, drew the representative body to the unhappy dilemma of either sacrificing the most essential interests of their constituents, or of meeting in General Convention to assert and preserve them. In March, 1775, the delegates of the people met in full Convention, the most numerous assembly that had ever been known in the colony, and made provision for the general safety. Subsequently the Governor called the Assembly together, but refused to act with them, and they adjourned, and then met in Convention as private citizens. And they say—"to preserve the peace and good order of the community, we are driven to the very disagreeable necessity of supplying the present want of government, by appointing proper guardians of the rights and liberties of our country. But lest our views and designs should be misrepresented, we again publicly and solemnly declare before God and the world, that we do bear faith and true allegiance to His Majesty George the Third, and that we will defend him and his government, as founded on the laws and well-known principles of the Constitution." But, they add, we are determined to maintain our just rights and privileges at every even at the extremest hazard. [See Journal of Convention, Richmond Ed., 1816, p. 17.

This declaration did not disclaim but affirmed allegiance to the Crown. May 15, 1776, the Convention, acting as delegates, deputed by the several counties and corporations in the colony and dominion of Virginia to represent them in General Convention, "Resolved unanimously, That a committee be appointed to prepare a Declaration of Rights, and such a plan of government as will be most likely to maintain peace and order in the colony, and secure substantial and equal liberty to the *people*."

This was the first authentic act of the people of Virginia throwing off allegiance to the Mother Country. Edmund Randolph, Patrick Henry, Madison, George Mason, and others, were that committee. They reported the celebrated Declaration of Rights, which has formed the basis of nearly every similar declaration since adopted by the Colonies and States, and therein laid the great corner-stone of freedom, upon which the Declaration of Independence of the United States and the government of every State in this Union is founded, viz. :—

"THAT A MAJORITY OF THE COMMUNITY HATH AN INDUBITABLE, UNALIENABLE, AND INDEFEASIBLE RIGHT TO REFORM, ALTER, OR ABOLISH GOVERNMENT, IN SUCH MANNER AS SHALL BE JUDGED MOST CONDUCIVE TO THE COMMON WEAL."

This report was made in the Convention, May 27, 1776, and was debated until June 12th, when it was fully adopted.

June 24th, the same committee reported "a plan of government," or constitution, which was adopted June 29th, and this was the first written constitution emanating from the people through their immediate representatives, which was ever adopted in the history of government, except, perhaps, the brief but emphatic written Declaration of Rights, that all should be governed by equal laws, which was signed in the harbor of Provincetown, on board the May Flower, the eleventh of November, 1620.

For a full explanation of these acts, so honorable to Virginia as the pioneer in free government, founded on the collected will of the people alone, reference may be had to the Journal of the Convention, before cited, pp. 27, 28, 17, 22, 42, 43, and 78. Also Burke's Hist. of Va., pp. 378, 382, 407, 415, 418, 421, and 429. See also Judge Tucker's opinion, in Kamper vs. Hawkins, 1 Virginia Cases, p. 71, and note. Burke's single volume, however, is but an imperfect chronicle of the great period of the Revolution, and, I am sorry to say, the history of Virginia still remains to be written.

The result of this historical parallel is, that Rhode Island was the first of the colonies that threw off allegiance, and Virginia the first to adopt a Declaration of Rights and a plan of popular government.

The subsequent history of government in Rhode Island will show how the glory of the first act of the assumption of the power of government in the name of the people has been tarnished by the pertinacious resistance of her minority Assembly, for more than sixty years, to a form of government that should be, in the language of her first charter, "a rule of the people."

The first to proclaim a government of the people, she has been the last of all the States in which the people have been able to establish their right to participate in government.

And but for the righteous struggle of those who framed and adopted the People's Constitution of 1842, Rhode Island now, if not forever, would have been in practice, but not in right, a mere minority landholders' corporation.

Another and earlier act of her Assembly also condemns all her subsequent history.

In June, 1774, the Assembly of Rhode Island passed resolutions, after the Boston port act, respecting the alarming condition of the colonies, in which they complain of *the deplorable*

condition of the colonies, *when by an act of Parliament, in which the subjects in America have not a single voice, and without being heard, they may be divested of property and deprived of liberty.*

They also declared that a firm and inviolable *Union* of all the colonies, in councils and measures, is absolutely necessary for the preservation of their rights and liberties, and recommended a Convention of Representatives from all the colonies. [Leg. Doc., p. 36.]

The first Congress assembled September, 1774. The General Assembly of Rhode Island appointed delegates in June, 1774; also in 1775, who voted for the Declaration of Independence.

July 18th, 1776, the General Assembly adopted the Declaration of Independence. [Page 39 of Leg. Doc.]

The Legal Effect of the Declaration of Independence upon Government.

This comes next in order, in tracing the source of power in Rhode Island.

By that act, the sovereignty vested in the people, and the Legislature was divested of all power to define or limit it.

"The Declaration of Independence made a Colony a State in an instant," says Mr. Dane, in his Abridgment, vol. 9, app. 19. "A State changes its form of government when it changes its source of power and absolves its original allegiance."

Thus he says that New Jersey, Virginia, &c., in 1776, made a new constitution and a new organized government solely on American principles, and with a source of power exclusively American. And on p. 25—"The original sovereignty of a whole people must be noticed as the fountain of all delegated power."

Mr. Justice Story, in the 1st of his Commentaries on the Constitution, p. 199, says :—

"The Declaration of Independence has always been treated as an act of paramount and sovereign authority, complete and perfect *per se*, and *ipso facto*, making an entire dissolution of all political connexion with, and allegiance to, Great Britain, and this not merely as a practical fact, but in a legal and constitutional view of the matter by Courts of Justice." [See 2 Dallas, 470.]

Where, then, was the sovereignty,—the controlling power over the colony and people of Rhode Island, and over the Legislature?

All legislation up to that time was subject to the King and Parliament. Do the Rhode Island charter party claim as successors to the King? But there can be no succession to sovereignty in free institutions.

See C. J. Jay, in 2 Dall., p. 219. "At the Revolution the sovereignty devolved on the people, and they are truly the sovereigns of the country; but they are sovereigns without subjects, (unless the African slaves among us may be so called,) and have none to govern but themselves. The citizens of America are equal as fellow-citizens and as joint tenants in the sovereignty."

After this what were the authentic acts of the people, or the nearest to it, establishing a form of government?

Washington says: "The basis of our political systems is the right of the *people* to make and alter their constitutions of government. But the constitution which at any time exists, till changed by an *explicit and authentic* act of the *whole people*, is sacredly obligatory upon all."

From the Declaration of Independence, which annulled the old source of power, we pass to the next authentic act touching government in Rhode Island—the adoption of the Constitution of the United States.

This is remarkable, as the only action concerning government in a popular form, namely, by a *Convention*, which ever took place in Rhode Island from the date of the Revolution to the framing of the People's Constitution in 1842.

Rhode Island was the last of the thirteen States to come into the Union. In 1778, she joined the Confederation, but from that period her Assembly indicated want of patriotism and respect to law. The articles of Confederation could not be amended without the consent of all the States, and in a great crisis she interposed her veto against all the other States.

When the Confederation proved ineffective, she refused to send delegates to the Convention to amend it. All this recusancy, which brought down upon her the pungent rebukes of Madison, Morris, Randolph, Lee, Iredell, Pendleton, Gorham, and others of the statesmen and patriots of that day, including her own Varnum and Greene, was the work of her minority Landholders' Assembly, and not of the people.

They sacrificed every possible principle of honesty and sound government in upholding their paper money system. To enforce this as a legal tender, they abolished the trial by jury, and by a summary process, without appeal, despoiled men of their property, deprived them

of all their elective franchises, and sent them to prison, for refusing to sell their goods for the trash which they called money.

This violation of all the obligations of contracts went on until the celebrated case of Trevett vs. Weeden, (cited in 1 Story's Comm., p. 469,) occurred in 1787, in which the defendant, a butcher, was arraigned before the Court, for not selling his meat for paper. James M. Varnum, an eminent lawyer, appeared in that cause, and assuming English liberties and common law rights as the unwritten constitution of Rhode Island, he prevailed on the Judges to pronounce the paper money law void. The Judges, for this act, were arraigned before the Assembly, who proceeded to rebuke and depose them; but the eloquence of Varnum in their defence, backed by the silent power of the non-voting people, terrified the usurpers, and they dismissed the Judges from their bar. The English language has rarely been made to express higher eloquence than is found in the full report by himself of the argument of General Varnum, printed by John Carter, of Providence, in 1787.

In looking back to the early history of the government of Rhode Island under the charter, this and other incidents cannot fail to suggest the singular inappropriateness of the successors of that government, in the Charter Assembly, claiming, in their opposition to American liberties and the rights of the people, to be the party of "law and order."

The opinion which General Varnum held of the General Assembly of his own State is very emphatically expressed in his letter to General Washington, giving the reasons why Rhode Island refused to join the Convention and come into the Union :—

"*New Port, June 18th*, 1787.

Permit me, sir, to observe, that the measures of our present Legislature do not exhibit the real character of the State. They are equally reprobated and abhorred by gentlemen of the learned professions, by the whole mercantile body, and by most of the respectable farmers and mechanics. The majority of the administration is composed of a licentious number of men, destitute of education, and many of them void of principle. From anarchy and confusion they derive their temporary consequence; and this they endeavor to prolong by debauching the minds of the common people, whose attention is wholly directed to the abolition of debts, public and private. With these are associated the disaffected of every description, particularly those who were unfriendly during the war. Their paper money system, founded in oppression and fraud, they are determined to support at every hazard; and rather than relinquish their favorite pursuit, they trample upon the most sacred obligations. As a proof of this, they refused to comply with a requisition of Congress for repealing all laws repugnant to the treaty of peace with Great Britain; and urged, as their principal reason, that it would be calling in question the propriety of their former measures."

In the Virginia Convention for the adoption of the United States Constitution, (among other strictures which may be found in 2 Elliot's Debates, pp. 51, 83, 92, 154, 171, and 457,) Governor Randolph said, "Rhode Island has been in one continued train of opposition to national duties and integrity." And Mr. Lee, of Westmoreland, said, "that small State has so rebelled against justice, and so knocked down the bulwarks of probity, rectitude, and truth, that nothing rational or just can be expected from her."

By this conduct of her Assembly, Rhode Island became isolated as to the Union, and Congress, by a special act, placed her, in respect to the States, on the footing of foreign nations, as to the duties on her exports.

Adoption of the United States Constitution by Rhode Island.

The Assembly was at last brought to its senses, or better men were chosen, and in January, 1789, the Legislature called a Convention to adopt the Constitution. The act was merely advisory and not compulsory. It *recommended* to the freemen to elect delegates to a Convention; and thus, so far as the legal voters were concerned, referred the action upon the Constitution to the people.

This was the first Convention on government ever held in Rhode Island. It was the highest to any authentic act of the people which her history exhibits down to 1841; and hence its action had a higher sanction than that of any Legislative body.

May 29, 1790, the Convention ratified the Constitution of the United States, and at the same time adopted and proclaimed a Bill of Rights. [Elliot's Debates, 223.]

The Bill of Rights of 1790.

"We, the delegates of the *people* of the State of Rhode Island, &c., duly elected, and having maturely considered the Constitution for the United States of America, and having also seriously and deliberately considered the present situation of this State, do declare and make known—

First. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

Second. That all power is naturally vested in and consequently derived from the people; that magistrates, therefore, are their trustees and agents and at all times amenable to them.

Third. THAT THE POWERS OF GOVERNMENT MAY BE REASSUMED BY THE PEOPLE, WHENSOEVER IT SHALL BECOME NECESSARY TO THEIR HAPPINESS.

Fourth. That elections of representatives in Legislature ought to be free and frequent, and all men, having sufficient evidence of permanent common interest with and attachmen, to the community, ought to have the right of suffrage.

Fifth. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the Legislature, is injurious to their rights, and ought not to be exercised.

Sixth. That no freeman ought to be taken, imprisoned, or dissezed from his freehold liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the trial by jury or by the law of the land.

Seventh. That every freeman ought to obtain right and justice freely and without sale, completely and without denial, promptly and without delay; and that all establishments and regulations, contravening these rights, are oppressive and unjust.

Eighth. That *every person* has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property.

Ninth. That the people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives; and that every person has a right to petition or apply to the Legislature for redress of grievances.

Tenth. That the people have a right to keep and bear arms.

Under these impressions, *and declaring that the rights aforesaid cannot be abridged or violated,* and that the explanations aforesaid are consistent with the said Constitution, we the said delegates, *in the name and in the behalf of the people* of the State of Rhode Island, and Providence Plantations, do by these presents assent to and ratify the said Constitution."

Here were four great rights recognized as the fundamental law and consitution of Rhode Island, higher than the charter and beyond the power of the Legislature to abridge or violate, viz.: that the source of all power is the people,—that the powers of government may be reassumed by the people,—that all men having a permanent common interest in the community are entitled to suffrage,—that the people have a right to assemble and consult for *their* common good.

On this platform of right we stand, as the basis of popular government in Rhode Island. The same Bill of Rights, with some modifications, was subsequently enacted by the Legislature, and is found in the Digest of Laws of 1798, p. 79. And a higher power than the Legislature had declared that not one of these rights could be abridged or violated, and that no body of men could deprive or divest their posterity of either of them.

Still the people of Rhode Island were without a written constitution, and remained so for more than half a century after this declaration.

It will be contended, on the other side, that there is no legal form of making a constitution but through the precedent action and consent of the Legislature. If such be the doctrine of American liberties, which we deny, then the people of Rhode Island could never have a written constitution, unless the sovereign will and pleasure of the Legislature should give them permission to make one, and prescribe the limitations, rules, and forms of proceeding. With this power, if conceded, the Assembly might limit the grant to a minority or to any class of men they might select; and if suffrage were confined to a minority, no matter how small, compared to the great body of the people, the minority might forever hold the power at their pleasure.

Upon this theory, constitutions would be mere grants to the people by their rulers, like the grants of kings to their subjects, from Magna Charta down to the concessions of some petty German sovereign.

Even the great Magna Charta of England was extorted by force from King John, and defended by rebellion against what was then called "divine right," and now "the divinity of government;" and its confirmation by King Henry the Third, when a boy under age, begins in these words:—"Henry, by the grace of God, King, &c., of our meer and free will have given and granted to all freemen of this our realm these liberties following." [Care's English Liberties, p. 10, Ed. of 1774.]

Recently, upon the restoration of the Bourbons in the person of Louis the Eighteenth, the French Chambers struggled in vain to compel that vagrant king, who came back from exile a mere beggar, to permit the constitution to be framed as a recognition and not a grant of

liberties ; but the king resisted, and the deputies submitted to take it as a grant from royal favor, and not an inherent right.

The whole struggle in Rhode Island for fifty years to make a constitution has been the same issue as that raised between King John and the Barons, and more modern legitimates and their subjects, namely, whether the people should make a constitution or the Assembly should grant it or not, at sovereign will and pleasure.

God grant that this high tribunal, in the seventy-second year of American independence, may not, by any act of their enlightened judgments, seem to sanction the revival of this exploded dogma of sovereign grants to a subject people. To do this would be, to the extent of the moral and judicial power of this Court, to command the law, not merely to stand still, but to go backward in the glorious firmament of free institutions.

How, then, were the people of Rhode Island to get a written constitution ?

Through the previous consent of the General Assembly, is the answer of our learned opponents.

We will, then, show the persevering petitions, the long suffering, the patient endurance of the people of Rhode Island, by

Unavailing Efforts for Sixty-Five Years to obtain a Constitution through the action of the Assembly prescribing the form.

We begin in the midst of the Revolution. September, 1777, upon application to the Assembly, as appears by the printed Schedules of that year, it was voted and resolved that his honor the Deputy Governor, (William Bradford,) Henry Ward, William Channing, Jonathan Arnold, and Rowse J. Helme, Esquires, be a committee, they or the major part of them, to form a plan of government for this State, and lay the same before this Assembly as soon as conveniently may be.

No report was made. Newport was then in the possession of the British, and the defence of the country occupied the Assembly and the people.

In April, 1782, a meeting of delegates from the towns in Washington County requested the General Assembly to call a Convention, but were refused.

In 1786, a bill, that each town in the State should have two representatives and no more, was sent out to the people by the House of Representatives, and rejected, as it ought to have been. It was a mere pretext of the landholders, to defeat equal representation.

In 1796, delegates assembled from eight towns in Providence and Bristol Counties requested the Assembly to take measures to frame a constitution, of which no notice was taken by that body. [Considerations by E. R. Potter, p. 14.]

In 1797, George R. Burrill, one of the most eminent lawyers Rhode Island has ever produced among her learned and eloquent bar, pronounced a brilliant oration in Providence, on the 4th of July, "in favor of a Republican Constitution."

I shall read some extracts from this authority, first to show the strong appeal made at that period to the minority rulers to give a participation in government to the disfranchised majority, and second to prove that the General Assembly of Rhode Island had no power to propose or frame a constitution.

"Something better than a void, or at most an imaginary, constitution, was to have been expected from the State of Rhode Island. We inhabit a crazy and comfortless mansion, shaken by the winds and pervaded by the storm. The materials are around us of a stable, commodious, and magnificent edifice. The foundation is laid in the independence of our country ; let the superstructure, the constitution, perfected from the models of our fifteen States, and the experience of our own numberless necessities, be raised and fixed upon it."

"But if, in a representative government, the smaller number of the people choose the majority of the Legislature, how shall a constitution, or a change in the constitution, be effected ? To petition this Legislature for equal representation, is to require the majority (there) to surrender their power, a requisition which it is not in human nature to grant. But is this evil to be perpetual ? Is there not in every government the principle of amendment and accommodation ?—a natural constitution, *paramount* to all positive institutions ? If there is not, there may then be, in a given case, a free people, who neither are, nor ever can be, governed by their representatives, and the government, thus corrupt and absurd, may exist, with all its errors and abuses, forever, exhibiting this parodox—*a free, sovereign, and independent people, desirous of changing their form of government, without the power of doing it.* Such a perpetuity is absurd and repugnant ; the power exists, in the State, and in every free State, and that of necessity and independently of any human provision."

"It is absurd to maintain that the people are free in a despotic government, or that the

government may be so constructed as that it never can alter or improve, and that its errors and abuses must be perpetual."

Again, speaking of the principles and immutable maxims of free governments, by which the people are supreme over constitutions, he says :—

"Rebellion, therefore, or *resistance to law and order*," [the very watchword of the Rhode Island Chartists,] "is not to be imputed to those who maintain this supreme authority, although they act in opposition to a *written* constitution, because wherever the two authorities interfere, the subordinate is void, and must give place to the supreme authority. Still less can the charge be alleged where there is no written constitution, or where it was never ratified by the people (the charter) but imposed on them by an authority which they have in the most solemn manner renounced."

As to petitioning the Legislature, he says :—

"The Legislature cannot create a constitution, since the Legislature itself is the creature of the constitution. Neither can the Legislature judge of the necessity of forming a constitution, or *dictate when or how it shall be formed*. To the Court is referred to pronounce judgment, to the Legislature the enacting of laws, and *to the people the forming of a constitution*. In petitioning the Legislature for a constitution, we are guilty of deserting from principle and abandoning right. We might as well petition the Court for a law. The question is referred to an incompetent tribunal. It is *coram non judice*. The determination of it rests with the people. It is that sole and transcendent act which resides in the people, and that not by representation, but personally and numerically. The Convention which forms the constitution is but a committee of the people. This is a jurisdiction which cannot be transferred. The exercise of it is *the resumption of delegated power, and a recurrence to the elements of government—the exclusive jurisdiction of the people in all questions relating to a constitution.*"

Fifty years ago this was sound doctrine from the soundest legal mind, even in Rhode Island. How came it rebellion and insurrection and resistance to "law and order" in 1841 ?

At the June session of the Assembly, in 1797, John Smith, of Providence, (a distinguished patriot in the Revolution, whose hands and means were always open to the friends of liberty, and who carried in his body to his grave a ball received in the old French war,) moved in the House to have a Convention called to frame a constitution, the Convention to be composed of delegates chosen in the ratio of one to every thousand inhabitants. Mr. Champlin, of Newport, seconded the motion, and it was carried by a vote of 44 to 26. It was rejected in the Senate.

Twenty-two years elapsed without further effort. In 1811, a bill was introduced in the Senate, by the Hon. John Pitman, (now Judge of the United States District Court for Rhode Island,) extending suffrage to every white male adult paying a poll or property tax or enrolled in the militia. It passed the Senate and was suppressed in the House.

In 1818, Connecticut abolished her charter and adopted a constitution, and Rhode Island was left alone in the Union without a written constitution. This revived the question, and a series of strong articles appeared in the Manufacturers' and Farmers' Journal, in November and December, 1820, and January, 1821, written by William E. Richmond, an able lawyer. A few extracts will show the opinions then held.

"A free people have, for more than forty years, submitted to a species of government, in theory, if not always in practice, as despotic as is that of the autocrat of all the Russias."

"The General Assembly, which now pretends to a legitimate right to govern us, exists and acts by its own authority alone—a platform of government which is devoid of all authority from the people, and which, though it gives the whole supreme power to eighty-four despots, instead of one, is not the less arbitrary and despotic on that account."

"The people of every political community are, under God, the only legitimate source of political power. To them, and to them only, belongs the right of establishing government; they may create, modify, or entirely alter governments at their pleasure." * * "If the people of this State wish to secure the inestimable liberties, which every freeman knows to be his unalienable right, they must make the ordinary legislative power what it ought to be, and in every other State is, the creature instead of the creator of the laws; the work of the people in Convention assembled."

"That omnipotent body (the General Assembly) should consider that the people are competent to form a Convention for themselves, without the authority of their *high mightinesses*;

and that *a longer delay of duty on the part of those who now set up the title of legitimacy, may produce such a result.*"

Some impression was made by these and other intimations that the people would act if the Assembly did not. Among other movements, the subject was agitated of electing a member to Congress by a majority of all the adult males in the State, who should claim his seat over the minority landholders' candidate, under the guarantee of a republican form of government; but did not come to a head.

In 1824, the Assembly were constrained to meet the demand for a Convention, but it was in bad faith to defeat and not to make a constitution. The minority even of the landholding minority held the power, through unequal representation, and were resolved to retain it. The act provided "that the freemen (landholders) qualified to vote be, and they hereby are, *requested* to choose as many delegates as they are entitled to choose representatives, to attend a Convention for the purpose of framing a written constitution."

Here again we have "*request*" and not command, which in itself is an admission of the want of power in the Assembly to call a Convention.

This minority Convention, which excluded the great body of the people, met and manufactured a miserable patch-work of a constitution, which limited representation to the minority, and retained the odious provision of landed qualification for suffrage.

Hon. Dutee J. Pearce, of Newport, made a cogent speech in the Convention for free suffrage, but the measure received only *three* votes in that unenlightened body of "*freemen*," as they boastingly called themselves.

This poor fragment of a constitution was submitted to the landholders alone, and by the landholders was rejected.

Again, in 1829, the patient majority people of Rhode Island approached the self-styled "omnipotent" General Assembly, and humbly prayed for a constitution that should give them a share in the exercise of government as well as in its burdens. 818 citizens, as petitioners, were heard before the Assembly, by their counsel, (of which the speaker was one,) and instead of what they asked, were given a scorpion. The result was the adoption of the bitter report by Benjamin Hazard, Esquire, a man as misanthropic as he was talented. The whole of this report is put in the record of this case, and if words are wrongs, here was enough to have roused resistance and justified revolution by the bayonet instead of the ballot.

The non-freeholders in Rhode Island were compared in this report (which was sanctioned by the Rhode Island Assembly) to the slaves of South Carolina. The slaves, said Mr. Hazard, "are a part of the people as much as those of other descriptions, who, on account of other disqualifications, are excluded from the exercise of the right of suffrage."

The extension of suffrage to citizens paying a small property tax without owning land was denounced in this wise :—

"Some article valued at the amount required, a watch for instance, was made to serve for any number of recruits, who thus qualified were marched up to the polls, one after another, attended by a guard to prevent any one of them running off with his qualification! Where the right of suffrage may be thus bought for a mite in the name of a tax, twice the amount of which a dexterous beggar might acquire by his trade every day in the week, this tax qualification is in truth merely a nominal one."

The report proceeds to denounce the naturalization laws, and the admission in other States of citizens of foreign birth to vote; and the war of 1812, for the inviolability of the American flag, is reviled, as a pretended national war to protect the importation of this staple commodity, not only here, but on the seas, against the claims of their native countries, for the prosecution of which the blood and the resources of the people were staked, and the nation burdened with a debt of millions!

Another of the evils that would destroy government, if free suffrage were introduced, the report reprobated in the form of the extension of suffrage to the African race. Finally the petitioners were classified with "troublesome demagogues and noisy political agitators, who gave but a poor promise of their suitableness to become freemen, and the longer they continued unqualified the better;" and were told, that if they and those who clamored for an extension of suffrage without land did not like Rhode Island and her institutions, they were at liberty to go elsewhere!

It is worthy of remark, that after these imaginary terrors about free suffrage had served the purpose of the landholders for half a century to exclude the people from the polls, every one of the evils most deprecated by the Assembly in 1829, have since been introduced into the present constitution of Rhode Island, by the charter party themselves, including even the "African race!"

The People's Constitution, which the defendants here denounce as the fruit of "rebellion,"

extended suffrage to every white male adult citizen of one year's residence, with or without taxation.

The constitution now in force in Rhode Island gives suffrage to every white or colored *native* adult, of two years' residence, who can buy it by paying a dollar, provided he registers his name four months before voting.

It is obvious that this prodigous change in opinion, from 1829 to 1843, could only have been effected in the Rhode Island oligarchy by the cogent arguments the people resorted to in making their constitution; and, when threatened with military resistance, assembling in arms to defend and uphold it as the supreme law of the land. If the Chartists did not surrender in person to Governor Dorr and his men on Acote Hill, history will record that they surrendered all the supposed principles they had pushed to the extremity of a conflict of arms, and thus demonstrated that it was love of power or pertinacity for exploded errors and not sound patriotism that led to their resistance to the right of the people to frame government. All the movements of the people, which they call "rebellion," but which, if the people are sovereign, was *fundamental law*, were caused, not by the supporters of the People's Constitution, but by the same wrong-headed spirit of opposition to popular rights, in which George the Third refused representation to the colonies until he was compelled to acknowledge their independence.

This is strikingly shown by an examination of the report of Mr. Hazard, which formed a crisis in the attempts of the people to get redress through the Assembly. The argument and the temper of that singular paper are characteristic of the casuistry with which the oligarchy in Rhode Island so long succeeded in excluding the people from participation in government.

It began by denying that the Legislature had any power to extend suffrage, and by consequence to make a constitution. It then maintained that the charter was the constitution of Rhode Island, and by it all power was resolved into the Assembly, and thereupon affirmed that "they are not a free people who hold their rights at the discretion of others, one or more."

This was the logic by which the landholders kept up their minority power. When asked to extend suffrage, they refused it on the pretext that the Assembly could not do it, because it belonged to the people. When asked to call a Convention of the people to make a constitution, they refused to let the people come in to extend suffrage, and thus defeated both suffrage and a constitution. Finally, when the people, finding the Assembly would not act, proceeded to act for themselves, the Assembly charged them with treason, because they had no right to move a step without the consent of the Legislature!

Were it necessary to justify the disfranchised people of Rhode Island for never again approaching the power that had thus spurned them, it would be found ample, conclusive, in the review taken thus far of their attempts to get a constitution through the action of the Legislature.

Another effort, however, was made in 1834, through the organization of the constitutional party, designed to combine all parties in the choice of members of the Legislature friendly to a constitution. Delegates from twelve towns met in Convention, in March, 1834, and suggested the outlines of a constitution, and published an elaborate address. At the June session of that year the Assembly again took up the subject, but with the same error so long and so obstinately persisted in, and "*requested*" the freemen to choose delegates to a Convention, to be composed of the same exclusive class that for sixty years had withheld suffrage.

This Convention met in September, 1834, and spent several weeks upon the frame of a constitution—then adjourned, met again, and for want of a quorum dispersed. It was well that they did so, for but *seven* votes could be found in that Convention to extend suffrage beyond the landholders.

May it please the Court, these proofs were offered by the plaintiff and are here shown, to take out of the case all pretence that the people causelessly acted without a form of statute law for holding a Convention to make a constitution. This was the time, and long before, when the advice of Washington in a like case should have been heeded:—"If the constitution be defective, let it be amended."

But the Assembly had resolved that it should never be made or amended to embrace within it any citizens but the minority landholders. It left no alternative but the eternal submission of the majority to the minority, or the preliminary action of the people outside of the forms of legislation.

In an independent State (aside from the federal relations to the Union) it would have justified any form of revolution by violence. Within a state of this Union, and under the principles and forms of American liberties, it justified a revolution by the peaceful usages of Conventions, without regard to any precedent statute of the usurping Legislature.

This was the course adopted by the people, and to show this, we will next consider the proofs in the record of the right and lawful establishment of a new frame of government through the

Proceedings of the People in Framing and Adopting the Constitution of 1842.

We start here with the *great right of the people to assemble.* This, in all forms of free government, is inherent. It belongs to citizenship, and can only be denied to serfs and slaves, who have no political rights and can therefore take no step whatever in the organization of government.

By the Bill of Rights, solemnly proclaimed by the Convention which adopted the Constitution of the United States for Rhode Island in 1790, it was declared "that the people have a right peaceably to assemble together to consult for *their* common good."

When that constitution was adopted, the non-freeholders of Rhode Island, as citizens of the United States, retained the reserved "right of the people peaceably to assemble."

Under this constitutional right, established by the Convention of 1790, paramount to the General Assembly, the people of Rhode Island assembled together to consult for their common good, and there was no power in the State to interpose to prevent it.

Details here, though not interesting, become of great importance to the argument. In 1840, Suffrage Associations were formed and met together. February 7 and April 13, 1841, a declaration of principles was adopted and published, affirming among other rights, that "whenever a majority of the citizens of this State, being citizens of the United States, shall, by delegates in Convention assembled, draft a constitution, and the same shall be accepted by their constituents, it will be, to all intents and purposes, the law of the State."

And their reason for this proceeding was, "that by the existing forms of government the control of the Legislature was vested in less than one-third of the free population, and that as the voters in this third are only a third part of the whole male adult citizens, it placed the control of the Assembly and of the State in one-ninth part of its adult population, so that three thousand men, out of twenty-five thousand citizens, held the whole power of making the laws." [See printed Record, pp. 70, 71.

This meeting appointed a State Committee to prepare an address, and their proceedings were transmitted to the Governor and the Legislature, who were thus officially informed of the movement.

At this point of time the two relative proceedings of the people and of the Assembly began in reference to a constitution. The first resulted in the People's Constitution, which was adopted, and the second in the Landholders' Constitution, which was rejected.

It has been affirmed and reiterated, that the people were unreasonable and hasty in urging their constitution, and not waiting for that emanating from the Assembly, which was nearly as liberal as theirs. Now it is easy to show that all that was liberal in the Landholders' Constitution was forced from them as *Magna Charta* was from King John, by the pressure from the people; and that had they paused in their work, no constitution reaching beyond the subsisting oligarchy would ever have been formed. To prove this, the following facts in the record are ample.

Relative Proceedings of the People and the Landholders.

1841—January session—The petition of Elisha Dillingham and 580 others, praying for a written constitution and extension of suffrage, was presented to the Assembly.

To divert this movement and that of the Suffrage Association, the Assembly resorted to the old expedient, and passed resolutions *requesting* the charter freemen to choose delegates from the freemen to hold a Convention on the 1st Monday of November, 1841, "to frame a *new* constitution for this State, either in whole or in part," to be voted for only by freemen. Delegates to be chosen at town meetings in August.

February 7—The Rhode Island Suffrage Association adopted a preamble and resolutions in the nature of a protest against the exclusion of all the non-freeholders, being a large majority of the citizens, from all participation in the formation of the Convention.

April 13—They reiterated the same, and invited "the citizens generally to meet" at Providence, on the 17th, for the furtherance of the cause.

April 17—A mass meeting was holden at Providence, re-affirming the same views. Adjourned to meet at Newport on the 5th of May, when the Charter Assembly would be in session at that place.

May 5 The mass Convention met at Newport, the State Assembly being then in session. A preamble and resolutions were adopted, asserting the right of the people to vote for delegates to a Convention for framing a constitution, and also for such constitution. A State committee of *eleven* was appointed. Adjourned to meet at Providence, Monday, July 5.

All efforts at the May session to extend the call beyond the landholders failed. The Assembly passed an additional resolution, fixing the delegation to the Convention on a basis of population, but in no respect changing the qualification of electors or members. Mr. Atwell's bill, offered as a substitute, changing the basis of population and fixing qualification of elec-

tors and delegates to residence of two years in the State and three months in the town, was laid over to June.

Should the people have stopped here?

All experience had shown the folly, futility, and want of good faith in attempting to frame a constitution on this false basis, and the people quietly proceeded in their work.

June 11—The State committee published an address, announcing their intention to call a Convention of delegates to form a constitution.

Still another effort was made to move the Assembly at their June session, 1841, but without effect. At that session Mr. Atwell's bill was rejected, 10 to 51. That distinguished advocate (since deceased) made a fourth attempt to extend the call to those who had paid town or state taxes a year before voting for delegates to the Convention, but this was also rejected

After, and not before, this final denial of all their rights, the people moved onward to their great purpose.

July 5—The adjourned mass Convention met at Providence, 6000 and upwards being present. Passed resolutions re-affirming the former ones, in the 5th declaring "inasmuch as the General Assembly have finally denied to the great majority of the people any participation in the Convention for framing a constitution, the time had arrived for the action of the people themselves," and approved of the call of the Convention for the formation of a constitution.

July 24—The State committee published their call for a Convention, delegates to which were to be elected by towns, on a basis of population. The Convention to assemble at the State House, at Providence, on the 1st Monday of October, 1841; every male citizen of twenty-one years and upwards, who had resided in the State one year preceding the election of delegates, to vote therefor. 1000 handbills were distributed, containing proceedings and call. Delegates to be chosen on 28th August, 1841.

August 28, 1841—Delegates to the People's Convention were chosen in town meetings in all the towns of the State, under Moderators and Clerks chosen in the usual forms of law.

August 31—Delegates were chosen by the landholders to their Convention. The only difference here was that the latter was done by *request* of the Assembly, and limited to landholders, and the former by the call of the people under their organization.

October 4, 1841—Convention to frame People's Constitution assembled at Providence.

October 9—Articles for the constitution were adopted by the Convention; and the Convention adjourned to meet again at the same place on the 16th of November. The articles adopted to be printed and published for the information of the PEOPLE.

October 13—The articles were published in pamphlet form and distributed.

Forty-three days intervened for deliberate consideration. The October session of the Charter Assembly passed without any action on the subject.

The first Monday in November the Landholders' Convention assembled at Providence to frame the Landholders' Constitution. After sitting a few days, they agreed on articles for a constitution; ordered them printed for information, and adjourned to meet again in February, 1842, to complete the work. These articles proposed to fix the *right* of suffrage on a qualification of 500 dollars, clear property! The effect of this was to restrict suffrage even below the ratio then existing of 134 dollars in landed property, and demonstrated that the great body of the people could get no participation in government from the oligarchy. Had they paused here, all would have been lost. The people wisely went on.

November 16—The Convention met at Providence and completed the constitution, and ordered it published.

November 18—The constitution was published and ordered to be voted for on the 27th of December and five following days, when the Convention adjourned to meet again on the 12th day of January, 1842, to receive and count the votes.

Town meetings were held in all the towns, under Moderators and officers chosen as required by the terms of the constitution. Each person voting wrote his name on the ticket he deposited, describing whether he was or was not a qualified voter, and the votes were duly registered, and the originals returned to the Convention.

January 12—The Convention met at Providence and formally ascertained the result. And on this point, as to a clear majority for the constitution, both of the whole adult male citizens and of the whole qualified voters in the State, the record finds the facts, to every legal effect for the purposes of this trial. The fact is to be taken, to all intents, as a part of the case, and the Court must decide upon this point, with both the majorities in both cases proved.

The result showed that the whole number of adult males in the State was 23,142. For the constitution 13,944—a majority of 4,746, had all voted. The whole number of qualified voters in the State was 8,984—majority, if all had voted, 1,298.

By all majority forms of voting, the majority of those actually voting prevails, and such was the rule adopted both on the Landholders' Constitution which was rejected, and the present constitution of Rhode Island, which was adopted in 1843. Further than this, in

1844 the name of every man in Rhode Island who voted for the People's Constitution was published by order of the House of Representatives in Congress, and of these names, after four years' public inspection, *not one has been found to have been fraudulently or falsely given.*

The fact, therefore, aside from all legal intendment, is demonstrated, and they who would argue down the People's Constitution must argue down the majority principle with it.

On the 13th day of January the Convention formally declared the constitution adopted, and made proclamation, which was published through the State. By order of the Convention, the constitution was sent to the Governor, and by him was communicated to the Assembly, then in session at Providence.

January 11—Mr. Atwell, in the House of Representatives, presented a bill for recognizing the People's Constitution as the paramount law of the State ; and

January 14—The People's Constitution, with the report and resolutions of the Convention as communicated by the Governor to the House, were read and laid on the table. Mr. Atwell called up the bill offered by him on the 11th, which was read.

January 19—Mr. Atwell gave notice that he should call up his bill the next day.

January 20—Bill called up, debated. Further discussed Jan. 21 and 22, and rejected, 11 to 57. The Assembly also refused to examine and count the votes by which the People's Constitution was adopted.

January 21—At the same session a resolution passed, charging the People's Convention with assumption of power—a violation of the rights of the government and of the people.

This was the first attempt of the Assembly to interpose against the people. It was merely denunciatory, and the people having peaceably made a constitution, through all the forms of Convention, and voting, it was too late for interposition, unless the rulers and not the people are sovereign in framing and establishing government.

At this point of time, the obstinacy of sixty years gave the first indication of concession, and the Assembly, though adhering to the limitation of *landholders for delegates*, extended the right of voting on the adoption of their constitution to those having the qualifications it should prescribe.

February, 1842—The Landholders' Convention again assembled at Providence ; and

February 19—Their constitution, having been amended and completed, was signed and submitted to the electors.

A salutary change had been produced in their views of popular rights by the People's Constitution. They gave up their death grasp upon land, struck out the 500 dollars' qualification, and extended suffrage to citizens having a residence of two years.

The vote on this proposed constitution then became the test whether it should supersede the People's Constitution already adopted. A spirited canvass of three days' voting was had, and March 23 the Assembly found their constitution rejected by a majority of 676, out of a vote of 16,072, thus *re-affirming* the adoption of the People's Constitution. In their exasperation at the people for the rejection of the Landholders' Constitution, the General Assembly, at the same session, (April 4,) passed an act of pains and penalties, to prevent the people from carrying their constitution into effect, or of holding any meetings for the choice of officers under it. This act (which has no parallel in legislation, except the paper money act of 1787,) has been usually known as the "Algerine act." Again, March 30th, it was moved in the Assembly, in order to reconcile all dissension, to submit the People's Constitution again to the popular vote ; but this was negatived, 3 to 59.

Such were the peaceful, deliberate, regular, and lawful proceedings of the great body of the people in framing a constitution ; and had not the Assembly resorted to an appeal to the President of the United States for aid in a military resistance to the new government, there would have been no disturbance of "law and order" in Rhode Island. The constitution which the Assembly afterwards were graciously pleased to "*grant*" to the people, wholly abandoning the land suffrage, clearly shows that the only point left with the charter party was the point of pride, namely, *the consent of the Legislature.* And the only question here will be, whether the people could not move without that consent, or whether they should have surrendered the constitution already adopted, and taken another permitted to be voted on by the Assembly, after that consent was reluctantly wrung from the ruling minority ?

But aside from this, the substantial objection in principle existed with the people, viz. : that the Assembly had never given consent to the *people*, but only to the minority landholders, to choose delegates to frame a constitution. To have yielded this, and permit minority rulers to make a constitution, excluding all participation in its provisions by the people, and merely calling for the yea and nay—this or nothing !—would have been the entire surrender of the great right of the people to *frame* as well as to establish government.

Establishment of the New Government.

The next step was to organize under the People's Constitution. If at this point it was the supreme law, all that followed was lawful.

April 18th, 1842, the general election was regularly held under all the forms of the constitution, without disturbance or interference, and all the officers of government, executive and representative, were voted for by those qualified under the constitution.

By the terms of the constitution, the old government was to continue until the first Tuesday of May, and on that day the constitutional Legislature met together, regularly organized both Houses, counted the votes, administered the oaths to the Governor and other executive officers, chose officers, enacted laws, and transacted all the business which it had been customary for the Assembly to do, in organizing the government at the May session. On the 4th of May, the Legislature adjourned to meet again the first Monday in July, having provided for the promulgation of its laws; for the continuance of Courts of Justice, and of all laws not repealed; and for the transfer of all the public property and records to the proper officers. These acts and resolves of the session, as published in the Schedule, make a part of the printed record of this case, occupying thirty pages; and this record of the proceedings under the new constitution, duly certified by the officers and by the Secretary of State, appears in all the authentic forms for the judicial notice of this Court, which are recognized by Courts of Law. The Charter Government can offer no other evidence of their existence. The only question that can be raised between the two, lies behind the record, and that is, who were the proper officers, holding power at the time?

The terms of all the officers and members of the Charter Government of 1842 expired in April, 1843. Nevertheless the landholders went on and elected new officers and members, after the adoption of the constitution, and held their Assembly at the same time the People's Legislature were in session.

By an act of the Legislature, Governor Dorr was required to take possession of and cause the public property to be delivered to the proper authorities and officers acting under the constitution and laws of the State. If he had the rights of office, it was his official duty to claim the immunities of title. In pursuance of this authority, he proceeded, on the 17th of May, to take possession of the arsenal in the city of Providence; and here was the first resistance of the landholders to the execution of the laws under the new constitution. That armed resistance would never have been resorted to, and the new government would have been quietly acquiesced in by the original minority who had opposed it, but for the aid which one of the distinguished counsel for the defendants, then Secretary of State, had prevailed on President Tyler, under a contingency, to promise to the defeated charter party; of all the naval and military force of the United States, *to put down the people.*

True, the President did not send his armies to invade Rhode Island, although he did his officers; but the pledge to do so, if the people did not surrender their government and submit to the usurpation of the minority, had the same effect. It drew the timid, wavering, unresisting, neutral, and peaceably-disposed all from the new government, and forced them to take part on the other side; and thus, after its distinct establishment and organization and action, in all the forms of election and legislation, its officers were driven with violence from the State, and its Legislature prevented from assembling, by the resistance of an organized military force, assuming to be backed by all the military power of the President.

This mode of putting down the new government, without first establishing another form, was either a suppression of rebellion, or it was rebellion itself against lawful government. They say the former. We maintain the latter, and this makes up the issue.

And whether one or the other, depends not upon the fact whether the People's Legislature existed two days or two years. If the constitution, and the Legislature under it, existed at all, though but for a moment, all the rights which accrue and appertain to a being *in esse* belonged to both. The birth, though but for a breath of life, if legitimate, carried with it all the broadest rights of inheritance and succession.

But a single authority is necessary to settle this point with the defendants.

"The understanding" (says Mr. Justice Story, in his Comm., vol. 1, p. 305, 306,) is general, if not universal, that *having been adopted by a majority of the people,* the constitution of the State *binds the whole community* PROPRIO VIGORE, (by its own innate power,) and is *unalterable*, unless by the consent of a majority."

Against this, where has American precedent a single respectable authority? In a research of six years, since this cause began, when and where have either of the learned counsel for the defendants found it?

If the constitution was adopted "by a majority of the people," then and from that hour it bound the whole community, proprio vigore. No matter who should follow or who should fly, upon the appearance of an armed force to put down the constitution; it was unalterable, "*unless by the consent of a majority.*"

Though all who made it had taken up arms against it, they were lawless rebels against established government, unless the majority had first established a new constitution which had superseded the old.

Between this period of the adoption of the People's Constitution in 1842, and the subsequent adoption of the existing constitution of Rhode Island in 1843, is the point of time that covers the trespass. The defendants claim that the old government continued, notwithstanding the new one.

We contend that it expired and the new government was in force until the people adopted another constitution in 1843, as they had a right to do.

In June, 1842, when Governor Dorr had issued a special proclamation for the People's Legislature to convene at Chepachet and enforce the laws, and both parties were in arms, the Charter Assembly passed an act, for the first time, *requesting the people*, and not the *freeholders* merely, to elect delegates to a Convention, to frame a new constitution. All were to participate in this choice of delegates, being twenty-one years of age and having permanently resided three years in the State. Under this assumed act, (which the Charter Assembly, even if in legal existence, had no delegated or inherent power to pass,) delegates were chosen, August 31, 1842. The Convention met and framed a constitution, September, 1842, abandoning the whole feudal doctrine of land tenure and primogeniture. The constitution was to be voted on, the 23d of November, 1843. The call for the Convention required that, to take effect, it must be adopted by "a majority of the persons having a right to vote." Fearing this could not be obtained, it was afterwards changed, by the Charter Assembly, to "a majority of the persons actually voting." Under this rule, the whole number of votes given for the constitution was but 6,836, of which all but 59 were yeas. 5,829 voted to admit colored persons as voters.

This diminished vote from 16,702, when the People's Constitution was tested, showed that the new constitution was permitted to pass, rather than adopted, by the majority of the people. The defunct Assembly had no more right to propose a Convention than the Suffrage Association had. But the sanction of the majority of the people actually voting, cured all precedent irregularity; and by the same rule, and no other, by which the People's Constitution became the supreme law, with 14,000 voters, the present constitution superseded it, though by a diminished vote of less than 7,000. Officers were chosen under it in April, and the government organized May 2d, 1843, and this is the subsisting government and constitution of Rhode Island. And this is the government which, unwisely taking up the resentments and prejudices of the dead, imprisoned the plaintiff for acting as Moderator, and sentenced Governor Dorr to a dungeon for life, as if he had really committed treason!

May it please your honors, these details comprise the three branches of the history of government in Rhode Island which I proposed to consider. From these facts embraced in the record as part of the plaintiff's case, we have the material to trace the source of power in Rhode Island in 1842.

We find then—

1st. A constitution peaceably framed and adopted by a majority of all the people, and by a majority of the *legal voters* under the charter laws.

2d. Officers of government chosen under it peaceably, in due form, and sworn.

3d. The Legislature meeting, and all branches of Legislative and Executive power in operation, peaceably, and without force. Up to this point there is no force, no collision between the old and new forms of government.

We then have a Government by Right, and a Government in Fact, Established and in Operation.

Here is no change of the *State*, in its domestic or federal relations. No lapse of government, no act of violence, no wrong, or injustice. The laws continued, and all rights protected. The great substantial change was in extending the number who should participate in government, and defining and limiting the powers of the Legislature. This was no wrong to the minority. If so, they did like wrong in the constitution of 1843, which superseded ours. Their suffrage required two years' residence, and registry for a dollar, and abolished primogeniture; ours one year's residence and registry, and abolished primogeniture.

The Proceedings of the People were all Peaceful and Lawful.

Up to April 4, 1842, there was no pretext of law against any act done by the people in adopting their constitution. None could have been passed to deny the right of assembling. If the constitution was in force, so as to go into operation, by the terms of its provisions, elections were to be held under it April 18, and this was the law. The old Assembly, chosen in April, 1842, instead of respecting this law, and preparing to conform to it, passed the odious act in relation to offences against the State, which declared meetings for choice of officers, other than by law provided, to be void. But here we come back again to the starting point. If the People's Constitution was the law, the meetings under it were lawful.

It is no answer for the defendants to say, that by the promised military aid of the President, the defunct government, when about to yield, became stronger than the new government, and were able to suppress it by force! This would be a sound argument for the title of William the Conqueror, as the source of legitimate sovereignty in England. But it is no *American* argument. Every fact by which the defendants assume to deny the existence of our government in Rhode Island, because theirs refused to surrender, and held possession by *force of arms*, proves nothing, unless it proves that the theory of Hobbes, which founds government on *conquest*, is the American theory, and not the social compact.

But this question is also settled by Mr. Madison, in the 43d number of the Federalist, p. 176. Discussing this very matter of the rights of majorities, as against physical force, he asks—

"*Is it true, that force and right are necessarily on the same side in republican governments?* May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine, that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election."

This embraces precisely the Rhode Island case. The numerical majority was clearly on the side of the people when the constitution was adopted and its officers elected. If left to itself, within the community which *alone had a right to determine upon its own local institutions*, the majority would have peaceably prevailed. What did the minor party do at this crisis? Just what Mr. Madison contemplated might be *lawlessly* done, if not restrained by fundamental principle. They had, in the great wealth of their own minority—merchants, manufacturers, and bankers—"a vast superiority of pecuniary resources," and they obtained, through the Secretary of State, and other political influences, a promise of "secret succors from a foreign power," which rendered the minority superior in an appeal to the sword. It was the few of the originally voting majority who were willing to fight for their constitution, against, not the Chartists and the deserters, but against the whole naval and military power of the Union!

And what has that to do with the right of majorities to make government? Must it be by a *fighting* majority, as well as a voting majority, that American constitutions are to be formed and established in the States of this Union? I therefore throw this element of force, and all the pretended acts of the old Assembly after the adoption of the constitution, entirely out of the question.

If the old Assembly could suppress the new organization by getting together unlawfully, and refusing to surrender the public muniments; in the same way, and by the same right, could they have put down the government under the existing constitution of 1843. So that if there be any thing in the argument that the People's Legislature never assembled but once, and that the old government held on against the new, it must go the length, not only of a previous consent, but a final ratification by the subsisting legislature, as indispensable to the exercise of the right of the American people to form and reform the institutions of government! And now

Having traced the History of Government in Rhode Island, and the proceedings in framing, adopting, and establishing the People's Constitution, in 1841-42, *what are the inferences to be drawn applicable to the issue between the parties in this cause as to the respective rights they claim, and the respective authorities under which they assume to have acted?*

First, I will consider it with reference to the local history and institutions of Rhode Island herself, and then upon the broad basis of American sovereignty.

We have seen that the old charter of Rhode Island, in 1663, was entirely free and democratic. The community consisted of landed proprietors, and it was, in effect, a landed company, in which all were partners and participants. As society progressed, and the number of inhabitants increased who did not own land, in the changes and progress of business, the inequality became more apparent.

The people then looked back to the old guarantees of liberty. Efforts at reform began and were continued, without success. The minority, holding the Legislature in their control, denied all extension of suffrage, and without it the majority could not act, within the form of law. Their only resource was to go out of it. The reluctance to take such a step, or to change existing institutions, was one cause of the continuance of the old form. We have seen that during the Revolution a committee on suffrage and reform was appointed, which shows the first impulse of public opinion, on the adoption of the Declaration of Indepen-

dence, but the state of the times prevented action. The patriotism of the people submitted to unequal government, rather than to disturb it at the risk of weakening the aid necessary to carry on the war of independence.

After the Revolution, Rhode Island was involved in debt and difficulties, and became embarrassed in her wretched paper money system. For a long time her Legislature, representing the landholding minority, held her back from the Union, and refused to adopt the United States Constitution. Her Assembly were at that period antagonists to the real people, and opposed to union. During the confederation, the Assembly recalled her delegation from the Congress, and at another session refused to send any, and this, too, when a measure most important to the country, viz. : to sink seven millions of the continental paper, depended upon her vote. [2 Elliot's Deb., p. 23, Ed. of 1836.]

In this state of things, and having a charter tolerably free, she did not adopt a written constitution, as did all the other States, except Connecticut, for a like cause. The majority did not break out, but for the time acquiesced. But there were no principles or practice of government in Rhode Island, which denied the right of the people, with or without the consent of the existing government, to make a constitution when and how they pleased.

On the contrary, Rhode Island, which had been foremost in religious freedom, had, by her great founder, Roger Williams, equally pledged herself to civil liberty. See his recognition of the right of self-government, more than two hundred years ago :—

"The sovereign and original foundation (of government) lies in the people, whom they must needs mean distinct from the government set up. And if so, *then a people may erect and establish what form of government seems to them most meet for their civil condition.* It is evident that such governments as are by them enacted and established, have no more power, and for no longer time than the civil power, or *people* consenting and agreeing, shall betrust them with. This is clear, not only in reason, but in experience of all commonwealths, where the people are not deprived of their natural freedom by *tyrants.*" [The Bloody Tenet : reply to Mr. Cotton.]

We have seen how the Rhode Island Assembly departed from the doctrines of religious freedom in 1663. They have still more flagrantly repudiated the principles of their illustrious founder, touching civil liberty. It is therefore no proof of a prescriptive right in her Assembly, in 1842, to deny self-government to the people, because that Assembly had always refused to extend suffrage, or permit the majority to participate in government by framing a written constitution.

The conclusion is, that both precedent and principle fairly construed, up to the Revolution, affirm or at least favor the right of the *people* of Rhode Island (not merely the landholders) to alter and establish government. At the Revolution this principle was authoritatively recognized. The Convention that adopted the United States Constitution, in 1790, went further, and all power was resolved into the hands of the people.

What then became of the Charter Government, and what powers can a Legislature under it have to control the organic law "FOR A LONGER TIME THAN THE PEOPLE, CONSENTING AND AGREEING, SHALL BETRUST THEM WITH."

At the Revolution, when the relation to the mother country was dissolved, the Charter Government was dissolved. It will not be denied that the whole body of the people had a right to declare independence of Great Britain, and put down the Charter Government, if it had then resisted the people. But it went with the people, and was acquiesced in, subject always to the right of the people, to whom the sovereignty reverted, to change it.

The sovereignty could not go from the King to the Legislature, because neither the charter nor the change gave any *reversionary right.* By rebelling against the King, the Chartists dissolved their charter from the Crown. They had, then, neither *a derived sovereignty, a sovereignty by succession, nor a sovereignty delegated by the people.* It was a government of consent, without a written constitution. Then if the *people* of Rhode Island, and not the Chartists, became the sovereign power in the State, when did they delegate or surrender it back to the government ? All the power the people yielded was a voluntary acquiescence of the whole community, in certain customs and usages of government, modified by acts of the Legislature. But of no *unrepealable,* binding force. What was the constitution ? If any thing, it was like that of Great Britain, an unwritten constitution. This was anti-American. But the people might make a constitution when they became independent, or might defer it. They could never *lose* the power to do it. No statute of limitation can run against the people—no acquiescence in wrong, or injustice, or inequality of one generation can bind its successors. Every despotism could stand on this, and the divine right of Kings be unquestionable.

What was there of *paramount* organic law in Rhode Island ? Not the charter. It had no element of change or modification. The laws under it, passed by the Assembly, were repealable at pleasure. The Legislature had no power, either from the charter or the people, or

inherent, to change the organic law, or to make one. If the *people* could not act, the Legislature could not, the voters could not: who could? Hence—

The American doctrine of a paramount written constitution, binding the Legislature, and subject only to the people, was lost in Rhode Island, if it did not exist in the whole people.

Admitting the right of the people to make a constitution and overthrow the British colonial government to have been acquired or confirmed by the Revolution, how did they lose it? When regrant it? If never, how can this right be denied to the people of Rhode Island, in setting aside their Charter Government, and adopting a written constitution to control their Legislature and officers? Then, if the right existed, how was it to be exercised? The subsisting government had no power or right to make a constitution. All their declarations of rights in the Digests of Laws were only repealable legislative acts, without guarantee.

Our opponents, doubtless, will concede a *right* of revolution, but say we must take it by *physical force!* The value of that sort of right to a State of this Union I will consider presently, but the right of revolution being admitted, does it follow that it must be by force! If the people have a right, they must also have a right to exercise it peaceably. If they do so without attacking the existing government, and peaceably set up a government of organic law, defined in a written constitution, and if after this is done, the old government, which is virtually superseded, attacks the new, then to defend the latter is not revolution, but *law and order*, and the old disbanded government is the aggressor.

This is the distinction between rebellion and the change of organic laws by adopting a written constitution where none exists.

Shay's Rebellion, the Whisky Insurrection, and the Anti-Rent Riots in New York, illustrate this; and this was the relation of government and people before the Revolution. Under the colonial government, the people, if they adhered to it, had no legal right to change it. The sovereignty of the King and Parliament precluded any such right. Revolution, therefore, and if revolution was resisted, war upon the existing government, were, at that period, the only resource—there was no lawful mode of changing a form of government. If the Charter Government of Rhode Island had sided with Great Britain, the people would have put them down. By siding with the people, the Charter Government gave no legitimate sanction to the Revolution. It was the same rebellion under the existing form of government. It had no foundation of right, except in the right of the majority to change government.

But we claim a new principle in government. The right peaceably to change government. The limit is that it shall be done by a majority. Not by first attacking the existing government or overturning the laws, and then making a constitution, as in the revolution of '76, but by first adopting peaceably a new organic law, establishing the fundamental principles on which the government shall be conducted, the officers chosen, and the laws enacted. In order to do this, the concurrence of the old government is convenient and desirable, but not indispensable.

The right to begin this work rests in the right of the people to assemble. Who has the right to interfere with them? Up to the point of adoption of the People's Constitution in Rhode Island, where was the right to interfere with them or put them down by force? No matter how the constitution was begun or put together. It was peacefully made, peacefully put to the people, and peacefully adopted by the majority. It then became the organic law. It went into effect by its own force, and organization and legislation took effect under it. It has all the efficacy of a government de jure and de facto. At this point the men of the old goverment at acked the new and attempted to suppress it by military force.

Not an act was done by the people, but in pursuance of the new organic law. If the majority had a right to make a constitution, then it was made, and became the supreme law. Therefore, to deny that the People's Constitution was the supreme law, when they assembled under it and chose officers, and their Legislature met to carry it out, all of which was done without revolution, or violence, or attack, is to deny the right of the people, under any circumstances, to *frame government except by the consent of their rulers;* and to this point our opponents must come, or yield the whole argument.

This would make the Revolution of '76 the shame instead of the glory of the nation. In some of the old thirteen colonies new forms of government were adopted against the consent of a portion of the Legislative and all of the Executive power. In Virginia, for instance. When attacked by the old government, ought they to have yielded to it? Why, then, should the people yield in Rhode Island, after they had peacefully adopted their constitution, chosen officers under it, and put the new frame of government in full operation? What had the majority done that constituted rebellion, insurrection, treason, or domestic violence?

They stood on better grounds as to RIGHT *than even the grounds of the Revolution.* They had the great civil right recognized as the corner-stone of American institutions—the peaceful right which the Revolution had established to frame government, and when duly adopted, then all the rights, civil and military, attached to sustain it.

There were no votes taken by the masses, or in Conventions, in the Revolution of '76, to

change the government. It was a resort to natural right, to be enforced, if resisted, by war, and in no other form. The first step to dissolve government, or to deny the supremacy of the Crown, was rebellion and treason, under all the then recognized legitimate doctrines of government. The colonial governments existed only by the sovereign grace and mere motion of the King. They had no inherent principle of reform or change.

The Revolution, being successful, established this new fundamental principle of government, and in Rhode Island it was distinctly recognized—"that the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness."

This the people did, and no more. They made no attack on existing institutions. They changed no organic relations of the people to the government. They violated no allegiance, they dissolved no community, they changed no relation of the State to the Union. The identity and integrity of the State remained the same. It was no more a change of identity, of relations of people and rulers, of the government and the governed, or of the federal relations to the Union, than a change in the codes of legislation.

The fundamental law was changed by peaceful, popular process. If the right to do so was with the people, the form was legal, and even legitimate, for it was sanctioned by the fundamental rule of government, lying at the foundation of all government. If they had this right, they exercised it as peacefully and legally as the Legislature could exercise their right in revising the code of State laws.

The theory of the opposite side assumes that the people of the States of this Union have acquired no rights in regard to government, by the Revolution, that the people under old governments did not possess. That is physical right, natural right. The *right* of *might*, which is no right, but mere physical power to do wrong or right. But there was no such thing as a peaceful change of government under old systems, and consequently no change of government without the consent of government. On the other hand—

American institutions recognize three great principles :

1st. The elective power, to change rulers.

2d. The representative power, substituting agency from the people for irresponsibility to the people.

3d. And behind all this, the power and right of the majority of the community to change at pleasure the organic law of the State, and prescribe forms of constitution as the supreme law.

This makes the distinction in principle and fact : the distinction between attacking an existing government, with lawless violence, and the peaceful organization of a new frame of the same government, and then, after it is so established, sustaining it under the forms of law. This is the Rhode Island case, and this is shown by the history of the proceedings up to the first attempts of the Chartists to resist the operations of the People's Constitution.

At the first step the Charter Assembly fell into a self-convicted absurdity. They had looked on and said nothing, except resort to the old deceptive mode of diverting the people from a constitution, by calling a *Landholders'* Convention. But, in January, 1842, they were officially informed by their Governor, that the people had made a constitution, and demanded of them to surrender up their agency to the new frame of government. Then they spoke for the first time, but it was only declaratory. They resolved that—

"Whereas *a portion of the people* of this State, *without the forms of law*, have undertaken to form and establish a constitution of government, and have declared such constitution to be the supreme law, and have communicated such constitution to the General Assembly ; and whereas many of the good people of this State are in danger of being misled by these *informal* proceedings—therefore *resolved* by this General Assembly, that all acts done by the persons aforesaid, for the purpose of imposing upon this State a constitution, are *an assumption of the powers of government*, in violation of the rights of the existing government, and of the people at large !"

Here we have, in a very little space, the concession of the whole argument. The old Assembly, in this resolution, wrote their own epitaph. They admitted that "a *portion of the people*" had undertaken to form and establish a constitution, that they had declared it to be the supreme law, and had communicated it to the Assembly.

This yielded the point that those who had made this constitution were a "*portion of the people*" of Rhode Island. This shuts up their argument that none but legal voters are people. It was not aliens, non-voters, strangers, or disqualified persons ; but whoever made that constitution were a *part* of the political society and community of Rhode Island ! Now add to this admission the great fact in this case, on which both parties stand here, that those who made that constitution were a majority of the *whole* people of Rhode Island, and here we have it legislatively declared, before the old Assembly expired, that a majority of the people of Rhode Island have formed and established a constitution, and have declared it to be the supreme law, and communicated it to the Legislature as such !

The only trouble was, this had been done, as the Assembly say, "without the form of law." That was, at best, a mere matter of form, which should never override substance in a great right. But the Assembly relieved the difficulty at once, by declaring that what they meant by making a constitution without the form of law was, "*an assumption of the powers* of government, in violation of the *rights* of the existing government."

And there stood their own Bill of Rights, solemnly adopted by the Convention of 1790, "that the powers of government may be reassumed by the people!" How, then, could it be "a violation of the rights of the existing government" for the people to do, just what they had declared, in 1790, by a Convention paramount to the Assembly, that they might do, "whenever it shall become necessary to their happiness?"

This they had done, and no more. In doing this there was no *rebellion*, because a new fundamental law was established, and new duties created between the people and their *agent*, the government. There was no *treason*, for a new oath and a new allegiance grew out of this fundamental change of law. Under the old system it was treason. Under the American system, it was the exercise of an inherent, inalienable, fundamental right. And the quality of this right could not depend upon the mere fact whether it was resisted or tolerated by the old form of government. If the latter resisted they made war, and not the people who exercised the right and sustained it against the war made upon them by the old government.

Who shall interfere at this point, when the frame of government is thus changed, by an explicit, authentic act of the people? The minority? They are absorbed in the political action of the majority. Even the majority, having once changed the frame of government, cannot put it down or resist it by force. They may change it again peacefully, by a change of the organic law. The old officers have no rights, for their election has no vitality after the frame of government is changed. The old Assembly have no right to interfere, for their powers, which came only from the consent and acquiescence of the people, have been reassumed by them, and the representative can only act under the new power of attorney.

1st. The facts show that the old Assembly, while in power, passed no law to restrict the people, even if they had power to do so, which is denied.

2d. That the assumed law, passed after the new constitution was adopted, was not attempted to be enforced till the new constitution was in full operation.

Now, if the constitution was adopted, all the subsequent acts were lawful. If the new constitution had not been fairly adopted by a majority, the Assembly had the opportunity to test it. By refusing to do so, they admitted it, and for all purposes it is a settled fact in the case at bar, as well as a fact in history.

It was the duty of the old Assembly to surrender its powers to the new Legislature. It was lawfully, legitimately superseded, as effectually as the former members of a Legislature or of Congress are superseded by the election of new members by the people. They had no more right to hold over than the old Congress under the Confederation had a right to hold over against the new Congress chosen under the Constitution, to which they had given no antecedent authority or consent, in its formation.

The functions of the old officers had expired. They had no more right to hold over than the old officers in Pennsylvania, in 1838, in what was called the Buckshot war, when they attempted to assume that the election by the people was void. Was that a case this Court could not have inquired into; and if the President of the United States had sent a military force, would that have legitimated the old government and legally as well as forcibly suppressed the new?

The new frame of government being in force, the officers chosen under it had the right to take possession of the public property and enforce the execution of the laws by all the civil and military power of the State, and those who resisted were making war upon the legitimate government, and resisting law and order. It follows that the attempt to take possession of the Arsenal, the 17th of May, 1842, and all the acts done to enforce the laws passed by the Legislature, were lawful. In the trial of Gov. Dorr for state treason, in 1844, the Attorney General conceded that "if Mr. Dorr was Governor, then he had a right to do all that he did." [Dorr's Trial, pp, 6, 10.]

If the principles on which the adoption of the People's Constitution are placed in the foregoing argument are sound, then the facts in the record being to be taken as proved, the conclusion follows that the acts done according to the law, under the new constitution, were valid, and all other acts contrary thereto were invalid.

What title to perpetual government can the charter party set up? Was it the right of possession? Was it prescription? The defendants say that the charter and form of government under it continued to be the fundamental law until the adoption of the present constitution, in 1843. We contend that the People's Constitution, and acts under it, intervened from May, 1842, until the adoption of the present constitution of 1843. All the pleadings and offers of evidence on both sides resolve themselves into this single issue, of previous consent of the Legislature as the indispensable antecedent of a constitution! The old Assembly made

this the whole issue. They said to the people of Rhode Island, " you have assumed to make and establish a constitution, without our consent, and therefore it is void."

Whether it was a constitution of *right* depends solely upon the *first step* in making it, viz. : whether the action of the Legislature, and that merely a *request*, was indispensable.

It all comes back to this : Is a constitution void and inoperative, unless the Legislature *request* the people to make it ?

Must the Legislature alone *permit*, and cannot the people go behind such permission. Can the Legislature refuse to act for half a century, and then *punish* the people for acting ?

If of right, without such beginning, it takes effect proprio vigore. The obstinacy of the General Assembly caused the whole difficulty. If they had done in 1841 what they did in June, 1842, all dissension would have ceased. The result shows that they were only contending for dogmatism, for they have done, in the last constitution, just what they charge us with rebellion and treason for doing. The surrender of land suffrage, as the only means of saving the collision that would have shattered the old dynasty, shows the necessity of the change demanded by the people ; and the whole point of law and order is that the Assembly would not do, in answer to the wishes of the people, what they afterward did do, and thereby admit they ought to have done at first.

The Judges of the Rhode Island Court, after sentencing Governor Dorr, for sustaining the People's Constitution, should have changed places and sentenced themselves for making a like constitution, which was equal treason to the old charter.

And yet they exhibited the singular spectacle, of Judges sitting under a new constitution, which, by the charter, the old Assembly had no right to make, and trying a distinguished citizen for treason to a departed government, which they themselves had helped to exterminate !

And the whole pith and point of this modern treason was, that the Assembly *requested* the landholders to put down the old government, but refused to request the people to do it !

We are now prepared, in the argument, to apply the foregoing facts in the Rhode Island case to the broad and general proposition, which embraces all free American States, of

The Right of the People to Change Government, and to judge of the Occasion.

Did this right vest in the people of the colonies by the operation of the Declaration of Independence ? This has already been demonstrated, and will hardly be denied from any quarter.

Then, have American institutions, in the States or in the Union, changed, modified, limited, or restricted this right, as it originally was declared to exist, " inherent and unalienable " in the people ? In short, is the sovereignty in the people, and how may they exercise it ?

It may safely be assumed that no man, or set of men, in a government where suffrage is in the hands of the masses, will venture to deny, in so many words, that the people are sovereign. Doubtless this will be conceded, gracefully if not graciously, by the distinguished counsel on the other side. But how conceded, is the question. I apprehend, from the tenor of the defendants' abstract of points, that while this same sovereignty may *seem* to be yielded to the people in terms, it will be qualified away, and in effect denied and abrogated, in detail and in all efficient operation. By their limitations and constructions, the people will turn out to be very great sovereigns, with very great powers, but without any possible *right* to exercise that sovereign power short of *rebellion* against the governments of their own creation ! That is the question we are to try ; whether this virtue of sovereignty has gone out of the people, by some sort of prescription, grant, acquiescence or submission, and become vested in the government, so that the people can never have the free use of it again, without some process of license or re-grant from the Legislature ?

We are not discussing revolutions by mere physical force, but a fundamental principle of right ; and to test this, we must first see what the right is, and then whether it is a mere abstraction or active and operative. When they talk of sovereignty, what is the sovereignty they mean ? That which we rest our argument upon, is the sovereignty defined by the enlightened advocates of liberty in the old world, and its founders and expounders in the new. Here I leave all speculation, and abide by the highest sanction of precedents. If dry in detril, it is vital in principle. Then

What is the Sovereignty of the People, as Defined by the American Principles of Government ?

The theory of the other side, and the only theory they can stand on to invalidate a constitution framed by a clear majority, through the peaceful forms of Conventions, is, that the people are sovereign not in themselves but through the forms of law emanating from the Legislature. In short, that the sovereignty has no power to make *fundamental* law, except through the permissive agency of *statute* law. We maintain that there is not a precedent,

of opposing the sense of a majority of the people, it declares itself a proper and formal tyranny in the fullest, strongest, and most correct sense of the word. I must, therefore, beg leave to submit to the public, whether the learned Judge is not clearly erroneous in his meaning, as well as his words, when he says, p. 251, that 'National distress alone can justify eccentrical remedies applied by the people.' I think I may safely defy all the world to prove, that there is any necessity of any distress, or of any reason assigned for a people's altering, at any time, the whole plan of government that has been established in their country for a thousand years; besides their will and pleasure. I am not speaking of the *prudence* of such a step; nor do I justify a people's proposing to alter their constitution, if such alteration is likely to be followed by worse evils than it is likely to redress; nor have I any thing to say concerning the difficulty of obtaining the real sense of the majority of a great nation. But I assert, that, saving the laws of prudence and of morality, the people's mere absolute, sovereign will and pleasure, is a sufficient reason for their making any alteration in their form of government. The truth is, therefore, that the learned Judge *has placed the sovereignty wrong, viz.: in the government; whereas it should have been in the people, next and immediately under God.* For the people give to their governors all the rightful power they have. But nobody ever heard of the governors giving power to the people. If the teachers of the exploded doctrine of the divine right of kings had taught the divine right of the people, they had stated that point in a just and proper manner."

Such were the teachings with which the fathers of the Revolution began to lay the foundations of free government.

How they applied and enlarged them, we shall find in *American maxims and precedents.*

To these we should look for the true definition of American liberties, though they were originally grafted on the stock of English liberties, that would have ripened into full, popular sovereignty, but for the pernicious theory that the people cannot take a legal step to reform government, without the consent of the very government they wish to reform or abolish.

In connecting great principles with long deferred but finally practical exemplification, the student in government will find a wondrous coincidence of sentiment between the American Declaration of Independence and the indictment against Algernon Sydney, Nov. 7, 1683, "that he traitorously did compose and write a false, seditious, and traitorous libel, containing these false, seditious, and traitorous English sentences:—'The power originally in the people is delegated unto the Parliament.' 'The King, as he is a man, is subject unto the people that makes him a King. If he doth not like this condition he may renounce the crown.' 'We may, therefore, change or take away Kings without breaking any yoke, or that is made a yoke which ought not to be one.'" [9 Howell's St. Trials, 801.]

Ninety-three years after the great martyr had sealed these truths with his blood, they were engrafted into the constitution of a republic, destined to embrace a whole *continent;* for so believed our fathers, when they gave to the acts of the confederation of the colonies the expansive name of *Continental* Congress, *Continental* Army, and *Continental* Money.

Declaration of Independence.

"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that when any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

The Virginia Declaration of June 12, 1776, had preceded this—"that a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter or abolish government, in such manner as shall be judged most conducive to the public weal."

No qualification, such as is now pressed upon us, can be found, anywhere, viz.: *provided the consent of the subsisting form of government shall be first had and obtained!*

And true to this fundamental principle, Virginia neither then, nor in the change of her constitution in 1829, made any provision for its amendment, and gave no such power to the Legislature, because it was reserved by the people. [Va. Conven. of 1829, p. 777.]

The Debates in all the Conventions that adopted a State or the United States Constitution, are filled with this doctrine, never doubted, or denied, or qualified away into impracticability. Volumes could be filled with extracts to this point. I must content myself with but a few, from the mass of authorities before me.

In the Virginia Convention of 1788, Mr. Nicholas said, "The people can, when they

please, change the government, being possessed of the supreme power. The people are the source of all power." [2 Elliot's Deb. 46, 98.]

Edmund Pendleton, President of the Convention—"Who but the people can delegate powers? Who but the people have a right to form government."—(p. 57.) Again—"Do we not appeal to the people, by whose authority all government is made."—(p. 79.) "The people are made the fountain of all power."—(p. 230.)

Patrick Henry (p. 65)—"This, sir, is the language of democracy, that a majority of the community have a right to alter their government when found oppressive." Again, speaking of free government—"One of the leading features of that government is, that a majority can alter it.—(p. 69.) "Rulers are the servants and agents of the people—the people are their masters.—(p. 248.)

Mr. Marshall—"Is not liberty secure with us, where the people hold all powers in their hands, and delegate them cautiously, for short periods, to their servants."—(p. 187.)

To the learned counsel, who have come up here, in behalf of the old Charter Government of Rhode-Island, to refine and explain away in practice, if they do not deny in terms, this fundamental doctrine of government, I may safely reply, in the rebuke of Mr Madison to the opponents of the Constitution, (in the 46th No. of the Federalist, p. 188)—"The adversaries of the Constitution," said he, "seem to have lost sight of the *people* altogether in their reasonings on this subject. These gentlemen must here be reminded of their error. They must be told that the *ultimate* authority, wherever the *derivative* may be found, *resides in the people alone.*"

And so said Alexander Hamilton, a statesman sufficiently conservative for any party:—"The fabric of American empire ought to rest on the solid basis of *the consent of the people.* The streams of national power ought to flow immediately from *that pure, original fountain of all legitimate authority.*" [No. 22 Fed., p. 87.]

In South Carolina even, where, out of Rhode Island, the practical sovereignty of the people is supposed to have been most questioned, her eminent statesmen, nearest to the revolutionary period, emphatically affirmed it without qualification. In the Convention, May, 1788, that adopted the United States Constitution, (4 Ell. Deb., 319 to 331,) Mr. Charles Pinckney said—"We have been taught here to believe that all power of right belongs to the people; that it flows immediately from them, and is delegated to their officers for the public good; that our rulers are the servants of the people, amenable to their will, and created for their use." * * * "I conceive it as indispensable in a *republic* that *all authority* should flow from the people." * * * "In every government there necessarily exists a power from which there is *no appeal*, and which, for that reason, may be termed *absolute* and *uncontrollable*. The *person* or *assembly* in whom this power resides, is called the *sovereign* or *supreme power* of the State. With us, *the sovereignty of the Union is in the people.*" * * * "Is there, at this moment, a nation upon earth that enjoys this right, where the true principles of representation are understood and practised, and where *all authority* flows from and returns at stated periods to the people?"

And quite recently, (in 1832,) in his "Comparative View of Constitutions," Mr. E. S. Davis, of South Carolina, said—"Among the various branches of science which constitute the education of an American citizen, that of government is highly important and necessary; *possessing the power of creating and amending the Constitution*, it is peculiarly incumbent on him to acquire the kind of knowledge which will best qualify him for the judicious exercise of *so precious a right.*"

The early Presidents of the Republic, who studied government in the school of the Revolution, all recognized this fundamental principle.

Washington, in his first inaugural address, (April 30, 1789,) began with his "fervent supplications to that Almighty Being who rules over the universe, that his benedictions may consecrate, to the liberties and happiness of the *people* of the United States, a government *instituted by themselves.*" [Hickey's Const. of U. S., p. 212.]

In his farewell address, he said, "the very idea of *the power and the right of the people to establish government*, presupposes the duty of every individual to obey the established government;" and in this connexion he affirmed that "the *basis* of our political systems is *the right of the people* to *make* and to *alter* their constitutions of government."

Even John Adams, the least republican of all our Presidents, in his *last* reply to the address of Congress, as President of the United States, says he is "compelled by the habits of a long life, as well as by all the principles of society and government which I could ever understand and believe, to consider *the great body of the people* as the *source* of all legitimate *authority*, nor less than of all efficient *power.*" [See House Journal, 5 and 6 Congress, Nov. 27, 1800.]

Jefferson, in his *first* inaugural address, March 4, 1801, declares that "the will of the majority is in all cases to prevail;" and he thus pointedly refutes, in a single sentence, all the false theories of grants to and guardianships over the people.

"Sometimes it is said that man cannot be trusted with the government of *himself.* Can he

from the time of Algernon Sydney to the time of Thomas W. Dorr, that gives a colorable sanction to such a theory of American liberties.

I begin with the discourses of Sydney on government, (London edition of 1763,) of whom Bishop Burnet said, "He had studied the history of government, in all its branches, beyond any man I ever knew."

These are the titles of some of the chapters :—

Chap. 1, sec. 6—"God leaves to man the choice of forms of government, and those who constitute one form may abrogate it."—p. 14.

Chap. 1, sec. 20—"All just magistratical power is from the people."—p. 54.

Chap. 2, sec. 3—"Government is not instituted for the good of the governor but of the governed."—p. 70.

Chap. 3, sec. 31—"*Free nations* have a right of meeting when and where they please, unless they deprive themselves of it."—p. 399.

Chap. 3, sec. 33—"The liberty of the people is the gift of God and nature."—p. 406.

Chap. 3, sec. 36—"The general revolt of a nation cannot be called a rebellion."—p. 413.

Chap. 3, sec. 41—"The people, by whom and for whom the magistrate is created, can only judge whether he rightly performs his office or not."—p. 436.

Chap. 3, sec. 44—"No people that is not free can substitute delegates."—p. 450.

Locke, who based government on the social compact, the theory of all our constitutions, placed the sovereignty where the Virginia Declaration of Rights finds it, in the majority of the community. [See Locke on Government, book 2, chap 8, sec. 95, pp. 270, 271, 272—"When any number of men *have consented to make one community or government*, they are thereby presently incorporated, and make *one body politic*, wherein the *majority* have a right to act and conclude the rest." Sec. 96—"For when any number of men have, by the consent of every individual, made a *community*, they have thereby made that *community* one body, with a power to act as one body, which is only by the will and determination of the *majority ;* for that which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way, it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority : or else it is impossible it should act or continue one body, *one community*, which the consent of every individual that united into it agreed that it should ; and so every one is bound by that consent to be concluded by the majority." This doctrine is illustrated and enforced through sections 97 and 98. Sec. 99—"And this is that, and that only, which did or could give beginning to any *lawful government* in the world." See also book 2, chapters 13 and 19.]

Mr. Justice Story, in his 1 Commentaries, note on p. 299, calls "Mr. Locke the most strenuous asserter of liberty and of the original compact of society ;" and in the same vol., from p. 296 to 300, the American commentator takes up and maintains the doctrine of Mr. Locke as to the powers and rights of a majority.

Burgh's Political Disquisitions is a work of signal excellence and of high authority, from the circumstances attending its republication in this country. It appeared in England just after the publication of the celebrated Commentaries by Sir William Blackstone, and combatted with great boldness and effect the dogma of that distinguished author, that sovereignty and the Legislature are convertible terms.

When the colonies began to resist the usurpations of the Parliament, the high authority of Judge Blackstone was appealed to as condemnatory of all acts of the people to establish new forms of government, without the consent of what was then held to be the "omnipotence of Parliament." The Legislative power, according to Judge Blackstone, (1 Comm., chap. 25,) was "the supreme and absolute authority of the state ;" and to such extreme was this theory of the British Constitution carried, that De Lolme well affirmed, "it is a fundamental principle with the English lawyers that Parliament can do every thing but make a woman a man and a man a woman."—(p. 134.) Bacon, in his Abridgment, went beyond this, and maintained that Parliament could transform the sexes, because it had made a woman Lord Mayor of London !

It is a singular fact, that the theory of Judge Blackstone, which, if not repudiated, would have bound the colonies forever under the despotism of Parliament, and defeated the Revolution, was maintained in precisely the same form of argument that is now brought to bear against the validity of the People's Constitution in Rhode Island.

Blackstone, in his defence of absolute power, was met by Mr. Locke, that "there remained still, inherent in the people, a supreme power to remove or alter the Legislature, when they find the Legislative act contrary to the trust reposed in them, for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." And this he answered by affirming, that "however just this conclusion may be in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution." (1 Comm., 161.)

And this is precisely the sort of abject sovereignty in making constitutions which our learned opponents will concede to the people. By binding their fettered sovereignty down to a *legal form*, through which Conventions are to be held and votes to be received for a constitution, which legal form must emanate from the Legislature, they come up fully to the British doctrine of supreme power in the *organization* and not in the *people ;* and they leave the sovereignty, just as the English commentator did, impracticable, and without the power of "taking any *legal* step of carrying it into execution," whenever the Legislature refuses to act.

This is, emphatically, the main point of difference between those who maintain and those who deny the validity of a constitution formed as we have shown that of Rhode Island to have been ; and, so as I may be able, I earnestly desire to present that issue here, not only as far as it rightly comes within this cause, but as before the higher tribunal of the people, that it may be understood what the statesmen, the rulers, and the judges of the land actually concede to the people of these States as their *practical* sovereignty in government.

Hence the necessity of going back to fundamental principles in American government, for "to recall men to original maxims is generally recalling them to virtue."

James Burgh, LL. D., was born at Madderty, Perthshire, Scotland, in 1714, and died in 1775, just as he had completed his three volumes of "Political Disquisitions." This work was republished in Philadelphia, in 1775, by Robert Bell, under the patronage of the most eminent patriots of the Revolution. A long list of "names of the encouragers" is appended, headed by "His Excellency George Washington, Esquire, Generalissimo of all the Forces in America, and a Member of the Continental Congress." Here follow the names of Thomas Jefferson, John Hancock, James Wilson, Charles Thompson, John Sullivan, Roger Sherman, Henry Middleton, Silas Deane, Benjamin Rush, and many other worthies.

The doctrines which the foremost American statesmen of that period encouraged, as the basis of government, are boldly sustained by the author, who thus refuted the fallacies of Judge Blackstone :—

Vol. 3, pp. 275 to 278—"I cannot help considering Judge Blackstone as one of the many among us who endeavor to lull us asleep in this time of danger. I own I do not understand his ideas of free government. 'Wherever,' says he, 'the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it ; the very notion of which destroys the idea of sovereignty. The supposition of *law* therefore is, that neither the King, nor either House of Parliament, (collectively taken,) is capable of doing any wrong ; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule* or *express legal* provision ; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.' (1 Bl. Com., 244.)

Here the learned Judge tells us, that, because neither can the King exercise an arbitrary restraining power over either of the Houses of Parliament, nor either or both Houses of Parliament over the King—therefore what ? 'Therefore the supposition of *law* is, that none of the three branches of the Legislature can do wrong, because the law feels itself incapable of furnishing an adequate remedy !' If the law or the lawyers suppose that none of the three branches of the Legislature is capable of doing wrong, for that they are supreme, and whatever the supreme power establishes must of course be right, as none can say to the supreme power, what doest thou ? yet history shows, that King, Lords, and Commons have often done very wrong things. And though the law 'feels itself incapable of furnishing any adequate remedy,' does it therefore follow that there is no adequate remedy ? The Judge says, the prudence of future times must find new remedies upon new emergencies ; and afterwards adds, that we have a precedent in the Revolution of 1688, to show what *may* be done if a King runs away, as James the Second did. Insinuating that if we had not such a precedent, we should not know how to proceed in such a case ; and says expressly, that, 'so far as this precedent leads, and no farther, we may *now* be allowed to lay down the *law* of redress against public oppression.' Yet he says, p. 245, that necessity and the safety of the whole may require the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitutions, no contract, can ever destroy or diminish. For my part, I cannot see the use of all this hesitating and mincing the matter. Why may we not say at once, that without any urgency of distress, without any provocation by oppression of government, and though the safety of the whole should not appear to be in any immediate danger, if the people of a country think they should be, in any respect, happier under republican government, than monarchical, or under monarchical than republican, and find that they can bring about a change of government, without greater inconveniences than the future advantages are likely to balance ; why may we not say, that they have a sovereign, absolute, and uncontrollable right to change or new model their government as they please ? The authority of government, in short, is only superior to a minority of the people. *The majority of the people are rightfully superior to it.* Wherever a government assumes to itself a power

of the people, those people, and, that I may apply the case closely, the people of Georgia, in particular, *could alter, as they pleased,* their former work."

In this case, and that of Brailsford vs. Georgia, the Supreme Court judicially considered and determined what was the existing constitution of Georgia, in order to decide the rights of a private party. The right of a citizen to sue a State was subsequently abolished, by an amendment of the constitution, but that only affected the jurisdiction and not the principle, as now applicable to a case clearly within jurisdiction, between citizens of different States. Even the late Mr. Justice Story is fully committed to the people on this fundamental point. In his Commentaries, vol. 1, p. 198, he says of the Declaration of Independence :—

"It was an act not competent for the State governments, or any of them, as organized under their charters, to adopt. Those charters neither contemplated the case, nor provided for it. *It was an act of original inherent sovereignty* by the people themselves, resulting from *their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness.*"

Again, p. 300—"The Declaration puts the doctrine on the true ground—that government derives *its powers from the consent of the governed, and the people have a right to alter it.*"

I will close these judicial references, by an authority that will surely be respected here, and which, with what has preceded it, must be conclusive, viz : Chief Justice Marshall, in 1803, speaking for the whole Court, in the case of Marbury vs. Madison, (1 Cranch, 176, cited 3, Story's Commen., 431,) :—

"The question, whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on *which the whole American fabric has been erected.* The exercise of this original right *is a very great exertion;* nor can it, nor ought it to be very frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the *authority* from which they proceed is *supreme,* and can seldom act, they are designed to be *permanent.*"

In McCulloch vs. State of Maryland, in 1819, 4th Wheaton, 404, the same high authority treats this as not an open question before the Court :—

"It has been said, that the people have already surrendered all their powers to the State sovereignties, and had nothing more to give. BUT, SURELY, THE QUESTION WHETHER THEY MAY RESUME AND MODIFY THE POWERS GRANTED TO GOVERNMENT, DOES NOT REMAIN TO BE SETTLED IN THIS COUNTRY."

And yet, may it please your Honors, Governor Dorr and his friends have been charged with treason, for acting upon this solemn dictum of the whole Supreme Court as if it were true ! Now take this emphatic expression of the opinion of the Supreme Court, through Chief Justice Marshall, and test it by the Rhode Island Bill of Rights, adopted by her *Convention* in 1790, viz. : "that the powers of government may be *reassumed* by the people," and we have the entire doctrine contended for by the plaintiff here, judicially established by the Supreme Court of the United States as unquestionable, and almost in the very words of that Bill of Rights, viz. : "*the people may resume the powers granted to government.*"

"Granted to government," is the phrase, not granted *by* government. Not granted subject to the condition that the power shall be resumed only by the consent and in the form of statute law prescribed by the grantee, the Legislature ! This "does not remain to be settled in this country !" and if so, how then stand these defendants here on their plea of justification by a denial of the sovereignty of the people ?

May it please your Honors, with this array of authorities and unbroken precedents against them, the counsel for the defendants, whatever may have been their original purpose, will be constrained to say that they concede the sovereignty to the people. What else have they to say ? But I could not trust to that concession, as they may be pleased to call it, followed as it must be, unless they surrender the whole cause, with restrictions and limitations; and therefore, the sovereignty which we mean, as defined by those who best understood and appreciated it, has been thus broadly spread out upon the argument. Well, then, if we have this sovereignty, how and when and by what process may it act ? Does it really exist in

practice or only in abstraction? And this brings us to the practical operation of this sovereignty in framing constitutions of government.

Then, if the People have the right, how may they exercise it? Who shall begin, the People or the Government, Conventions or Legislatures?

We say the former. The proposition on the other side is, you must have a statute law to call your Convention and count your votes, and say who shall vote and how, or you cannot take a step to make or alter the frame of government.

It is not so, unless this boasted sovereignty is but a mockery, a delusion, and a snare. Will this Court say to the people of each State in this Union, that true it is they are the source of all political power, but if they presume to exercise their sovereignty in establishing or changing constitutions of government, without consent of the Legislature, they shall be followed with pains and penalties, enforced by the lawless despotism of Martial Law, and backed by the whole military power of the United States, called out by the President to suppress insurrection and domestic violence! Whenever this tribunal shall proclaim this to be the law, it will have decreed that, in contemplation of law, the people here, as in Great Britain, do not exist. Such is not the law of this land, here, nor elsewhere. On the contrary, all American precedents and practice of government demonstrate that the assumption —that the first step in reforms and changes of government—must emanate from the established government, and not from the people, is the dogma of *despotism!*

To this point all the foregoing authorities directly tend. It is the incident that follows the principal, for it were as absurd to concede entire freedom to the individual and deny his right to move a hand without the leave of a master, as to affirm a sovereignty of the people incapable of taking the first step to make or remodel their frame of government. This is our main point of difference.

We shall agree on the right to abolish, but divide on the *mode.* They make the mode an inseparable barrier to the exercise of the right, the form superior to the substance—dependent on another tribunal than the people and one of their own creation!

True, it is said that the people, though sovereign, may limit themselves, as well as their governments, by their constitutions. Doubtless they do so, through representation, as to the making and enforcing of statute law, which they leave to the subsisting organization. And so they prescribe the modes of *amending* constitutions. But who do they *limit* in this power of making and amending constitutions? The Legislature and not *themselves!*

I pray this may be marked, because the practical exercise of the sovereignty depends upon it. Constitutions are made to control the Legislature and to control majorities as to all exercise of rights under the constitution. While it subsists, all are governed by its limitations, and so far the majority as well as the minority have limited themselves. Now comes the question of change in the constitution. Who are limited by it in making that change? The *Legislature.* They can move only by proposing amendments to be sent out to the people who are voters under the existing constitution, or to call Conventions, if the constitution so provides. They cannot move a step outside of the constitution. But are the *people* who made this constitution limited in their power of amendment, because they have restricted the Legislature? Will the learned counsel on the other side show a provision in the twenty-nine constitutions of these States which says that "We the people hereby agree never to amend this constitution, or to make another, in any other way, except that which is prescribed herein, through the Legislature!"

There is no such thing in existence, nor any thing like it. All the power of amendment given in all the constitutions *limits* the Legislatures. *They* shall not touch the constitution, except in the way the sovereign power permits them to act. But behind this stands the sovereign who made, and who has the like power to unmake. The sovereign, if he had power to make, has not granted away that power. The power given to the Legislature is *permissive,* and exhausts no part of the reserved powers of the grantor. Even the present constitution of Rhode Island says "that the General Assembly *may* propose amendments to be submitted to the electors, and if *three-fifths* of the electors approve, such amendments shall become a part of the constitution."

It follows, then, that the Legislature cannot propose or adopt any amendment of the constitution in any other way, but the people have not tied themselves down to a three-fifth rule; they have tied the Legislature, but behind all this is the sovereignty acting by and through majorities, and if they ever had a right to act through Conventions to establish a frame of government, they have no where granted or ceded it away. True, the State Constitutions require more than a majority of the Legislature to propose amendments, but this only limits the Legislature, and does not touch the majority principle in the people.

Now let us go back to the first step in free government, and having the source of power in the people, trace its practical operation in making constitutions.

The position may seem plausible and eminently conservative, that it will not do to trust

then be trusted with the government of *others*, or have we found angels in the form of kings to govern him? Let history answer this question." [Hickey's Collection, p. 276.]

And again, in the selection from his cabinet opinions, found in Rayner's Life of Jefferson, p. 377, this right of controlling government is vividly enforced. Speaking of the elder age, he says :—*We have not yet penetrated to the mother principle, that 'governments are republican only in proportion as they embody the will of the people, and execute it.'* Hence our first constitutions had really no principle in them. Though we may say with confidence, that the worst of the American constitutions is better than the best which ever existed before in any other country, and they are wonderfully perfect for a first essay yet every human essay must have defects. It will remain, therefore, to those now coming on the stage of public affairs, to *perfect* what has been so well begun by those going off it." * * * "Laws and institutions must go hand in hand with the progress of the human mind. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors." * * * "Each generation is as independent of the one preceding, as that was of all which had gone before. It has, then, like them, a right to choose for itself, the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors."

Again he says—"It is now forty years since the constitution of Virginia was formed. Within that period, *two-thirds of the adults* then living are now dead. Have then the remaining third, even if they had the wish, the right to hold in obedience to their will, and to laws heretofore made by them, the other two-thirds, who, with themselves, compose the present mass of adults? If they have not, who has? *The dead? But the dead have no rights. They are nothing; and nothing cannot own something.* Where there is no substance there can be no accident. This corporeal globe and every thing upon it belongs to its present corporeal inhabitants, during their generation. They alone have a right to direct what is the concern of themselves alone, and to declare the law of that direction; and this declaration can only be made by their majority. *That majority, then, has a right to depute representatives to a Convention, and to make the constitution what they think will be best for themselves.* If this avenue be shut to the call of sufferance, it will make itself heard through that of force, and we shall go on, as other nations are doing, in the endless circle of oppression, rebellion, and reformation; and oppression, rebellion, and reformation again; and so on, forever."

Mr. Madison, pre-eminently the expounder of the Constitution, entertained none of those morbid fears of the people, which have made them slaves in the old world, and would now make them the mere *incidents* of government in the new.

"All our political experiments rest on the capacity of mankind for self-government," said Mr. Madison, No. 39, p. 149, of the Federalist.

And again he said, (p. 150,) as if in prophetic condemnation of the landed oligarchy in Rhode Island, who have so long denied participation in government to the people :—

"It is essential to a republican government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; *otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers*, might aspire to the rank of republicans, and claim for their government the honorable title of republic."

Still more pointedly Mr. Madison settles this question for us, as unquestioned and unquestionable, in his Helvidius, p. 79, April, 1793. "If," says he, "there be a principle that ought not to be questioned within the United States, it is, *that every nation has a right to abolish an old government and establish a new one.* This principle is not only recorded in every public archive, written in every American heart, and sealed with the *blood of a host of American martyrs; but is the only lawful tenure by which the United States hold their existence as a nation.*"

To these may be added the solemn incorporation of this fundamental principle in nearly every State constitution. They should be familiar to all, and need not here be recited.

The foregoing authorities embody the unanimous opinions of American statesmen and publicists. Equally conclusive are the judicial constructions as to the source of power, sanctioned by the decisions of the Supreme Court of the United States, from its first organization until now.

Mr. Justice Wilson, a signer of the Declaration of Independence, and one of the earliest judges on this bench, who died in 1798, maintained this principle with great fervency, both in his judicial opinions and in his writings. In his Lectures on Law, (vol. 1, p. 17, edition of 1804,) he says :—

"Permit me to mention one great principle, the *vital* principle I may well call it, which diffuses animation and vigor through all the others. The principle I mean is this, that the supreme or sovereign power of the *society* resides in the *citizens at large;* and that, there-

fore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient."

Pages 20, 21—"A revolution principle certainly is, and certainly should be taught as a principle of the Constitution of the United States, and of every State in the Union. This revolution principle—that, the sovereign power residing in the *people*, they may change their constitution and government whenever they please, is not a principle of discord, rancor or war; it is a principle of melioration, contentment and peace."

Page 25—"The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man.

This truth, so simple and natural, and yet so neglected or despised, may be appreciated as the first and fundamental principle in the science of government.

Oft have I viewed, with silent pleasure and admiration, the force and prevalence, through the United States, of this principle—that the supreme power resides in the people; and that they never part with it. *It may be called the panacea in politics.* There can be no disorder in the community but may here receive a radical cure. If the error be in the Legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy: from their power, as we have seen, there is no appeal; to their error there is no superior principle of correction." [Speech in Penn. Con., on adopting U. S. Cons., Nov. 26, 1787.]

In the case of Vanhorne's Lessee vs. Dorrance, in the Circuit Court of Pennsylvania, 1795, 2 Dall., 308, the opinion of Patterson, Justice of the United States Supreme Court—

"What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is *certain* and *fixed;* it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. *The life-giving principle* and *the death-doing stroke* must proceed from the same hand. What are Legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their power from the constitution. It is their commission, and therefore *all their acts* must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity."

In Chisholm vs. the State of Georgia, 2 Dall., 448, in the Supreme Court, 1793, Mr. Justice Iredell held—"A State does not owe its origin to the government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of *the people.*"

Again—"The *people of the State* created, *the people of the State* can only change its constitution."

Penhallow vs. Doane, 3 Dall., 92, 93, decided in 1795, the same Judge of the Supreme Court held that—"The great distinction between monarchies and republics (at least our republic) in general, is that *in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him*, though in some countries with many important special limitations. *But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community which forms such body politic.* In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only."

John Jay, the first Chief Justice of the Supreme Court, "one of the most worthy men bred in the school of the Revolution," was clear on this point, as in the case of Chisholm vs. Georgia, before cited. [2 Dall., 471.] And again, p. 470, he says:—"The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns *by State Conventions and other temporary arrangements.* From the Crown of *Great Britain, the sovereignty of their country passed to the people of it.*"

Again, same and following page—"It is remarkable that in establishing it (the constitution) the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We the people of the United States do ordain and establish this consiitution.' Here we see the people acting as sovereigns of the whole country; and, in the language of sovereignty, establishing a constitution."

In the same case, Mr. Justice Wilson says, pp. 463, 464—"If those States were the work

the mass of community with the power to assemble together, and ascertain the will of the majority in any other form except by a statute, prescribing who shall vote, and when, and where, and how ! But this is not an American principle.

The serious objection to this position is, that it resolves sovereignty into the government, and takes it from the people. This is plain, because he who *alone* can take the first step is the sovereign. At his will all progress stands still.

Another objection is, that this theory founds sovereignty in *suffrage*, and not in the *people*. The argument resolves itself into the proposition that suffrage limits sovereignty, and, when suffrage is once prescribed, whether to a minority or a majority of community, these are the eternal limits of sovereignty. Every thing outside of suffrage is excluded from participation in sovereignty and of consequence in government.

In other words, the legal voters once established, few or many, are, through their representation in the law-making power, the sovereign and ultimate power in a State, and they may forever exclude all others from government.

But who made the legal voters ? In a limited monarchy they are made by the grant of the King, or act of Parliament, both acting as the sovereign power in the State. In governments of a more popular form they are made by the constitution ; or, as in Rhode Island, by the Legislature without a constitution.

True, then, the legal voters are the ultimate power under the constitution ; but that is the act of the sovereignty, the rule prescribed by it, and not the sovereignty itself, which is higher and beyond the organic form of its own creation.

While that constitution subsists, or while the law-making power, which says who shall vote, is supreme in power, the people consent to limit the exercise of government within these bounds, and so far the right to elect and be elected to office is limited and prescribed for the time being. But it is not perpetual, and if in the hands of a minority, it is not past all remedy without the consent of that minority, unless the majority resort to violence, revolution, and civil war.

This is the theory of the old world, which American liberties have exploded. The theory may stand very well, when the whole people can act through organization. But when the legal voters refuse to act through organization, or in its absence, we must go outside of organization to look for the sovereignty, or we have a *despotism ;* and whether it be a despotism of the divine right of Kings which is their law, or of a Legislature restricting suffrage to a minority which is their law, it is the same in its effect upon all who are excluded thereby from participation in government. And if these are a majority, as in France, in England, and in Rhode Island, then there can be a State wherein the sovereignty is rightfully held by a minority, and the majority of the people are *not* sovereign !

This brings us to consider American authorities and precedents, as to the mode of making and changing Constitutions, and the exercise of Sovereignty therein.

The principle we contend for began to be developed in England long before it was put in practice in the colonies. From the emigration to Plymouth, in 1620, (when the first written constitution of a government of equal laws was entered into by community, and thus practically anticipated the theory of Locke's social compact, in the origin of government in this country,) and particularly in the time of Cromwell, in 1659, the public mind had been much exercised on questions of government.

When the kingly office most needed aid in the person of the amiable but obstinate Charles the First, Sir Robert Filmer wrote his Patriarcha, which fell dead with the King on the scaffold. It was reproduced on the restoration of Charles the Second, to sanctify the office of that abandoned prince.

And here may be found an instance of one of those reproductions in the history of centuries, that often illustrate the maxim of the wise man, that there is nothing new under the sun. Sir Robert Filmer's divine right of Kings, which seemed to have been consigned to the sleep of two hundred years, was in fact revived in Rhode Island, to give sanctity to the charter of that same King Charles, whom it had originally defended. And I may be permitted to add, with entire respect to the learning and piety of the reverend author, (till recently a citizen of Rhode Island,) that but a few days ago, in presence of the Executive and Legislative authorities of Massachusetts, in the annual election discourse, Locke's theory of social compact and the source of power in the people, which expressly form the basis of the constitution of that State, and of the United States, were condemned as "atheistical, unscriptural, and untrue ;" and the dogma of Sir Robert Filmer reproduced in fervid eloquence and beautiful diction, with the single substitution of "the divinity of government" for the "divine right of Kings." [Election Sermon by Rev. Dr. Vinton, Jan 5, 1848.]

It is not, therefore, merely a phantom that we see in this denial of popular sovereignty.

Sir Robert Filmer's work was utterly refuted by Sydney's remarkable discourses on government, in 1683. Filmer's system maintained that all government was absolute monarchy,

and that no man is born free. This absolutism he found in the doctrine of the *Fatherhood*, and thus traced the kingly office, by divine succession, from Adam, as the first father, through the eldest son, down to King Charles! His text was "Honor thy father."

Locke wrote his treatise to refute this absurdity. In his title he treats it as a theory then first "detected and exposed," which did not do justice to the memory of the martyr Sydney. In a single sentence he abolished Sir Robert's platform, by showing that he had left out of the text the *mother!* He maintained the theory of the social compact, by express or implied consent, and placed the power in the majority of the people, without distinction of property qualification. He further held that the Legislative power, derived from this compact, reverted to the people, when it became necessary to resume it, and that they might erect a new form as they think good. [Chap. 13, sec. 149, and ante.]

Then came the revolution of 1688, and the dethronement of James the Second, on the fiction of law that he had vacated the kingly office by his breach of contract with the people, and had voluntarily abdicated and left the kingdom, though the poor monarch had literally fled for his life, to escape the fate of his father Charles.

This gave fresh impulse to the discussion. The philosophers began it, and the people carried it forward. In the self-called Convention which assembled in England, after James was driven from the throne, their only warrant was found in the inherent sovereignty of the people, and their right to change a bad government, without its consent, for a better.

Even the lawyers had to come to this. Sergeant Maynard said—"Our government is mixed, not monarchical and tyrannous, but has had its beginning from the people." And so said others. Sir George Treby—"It is by the people's consent we make laws." Sir Thomas Charges—"We have power to make it (the government) from a successive monarchy an elective." Sir Robert Howard—"I have heard that the King has his crown by divine right, *and we the people have divine right too!* But he can forfeit it if he break that pact and covenant with his people who have right by reason of their election as well as in the name of Mr. King!" [See Cobbett's Parliament Hist., pp. 39, 40, 46, et seqs.]

All the great lawyers in this Convention held, as Mr. Locke held, that "the constitution of the government is actually grounded upon pact and covenant with the people."

But he further held that the Legislative power derived from this compact reverted to the people when it became necessary to resume it, and that they might erect a new form, as they think good. The main division of opinion was on this point. One portion, admitting the necessity of original consent, in the social compact, denied that the consent once given could ever be recalled, and held that the power conferred by the people on the government could not be resumed. The freer party held that the right of the people to self-government was inalienable and indefeasible, and could not be surrendered. This was the American doctrine, and with it the people of Massachusetts had deposed Sir Edmund Andross, before they heard of the English Revolution.

Then came the American Revolution. This was not war upon the existing government, but an attempt to establish government on new principles. It might have been peaceful, had not England made resistance or submission unavoidable. Even Massachusetts and Virginia talked of fealty to the King, while deposing his governors and councils.

But a new state of things arose. They must have government. All their laws looked to the King and Parliament as the government. Where were they to look for the source of government? Virginia declared in her old constitution "that the government of this country, as before exercised under the crown of Great Britain, was totally dissolved." All the colonies, except Rhode Island and Connecticut, created forms of government for themselves. No citizens who desired participation, or complained of exclusion, were prevented from taking part in establishing the constitutions. There was no preceding act of existing governments establishing government, but it all came from the people. There was no treason in this on sound principles of government. So in Rhode Island the people were traitors to nobody. They acted under law and order and good government.

The people fought out this principle in the Revolution, and we are enjoying it peacefully. Now, have we got to fight it over again, or submit to the new form of Legislative sovereignty? It is not a question as to the best mode of changing government—but is it *right?*

Rhode Island stood on her charter, but as we have seen, her Convention, when adopting the United States Constitution, in 1790, solemnly affirmed—"*That the powers of government may be reassumed by the people, whenever it shall become necessary to their happiness.*"

Now in all these cases the voting body were the majority. In each State, therefore, the new form of government was the act of a majority of the whole people; or the act of a portion acquiesced in by all. But because the majority may have acquiesced, they are not bound forever. "The present is not the slave of the past."

We thus have government established by popular sovereignty, as the basis of our institutions.

Then comes the question, is it irrevocable, or can it be changed? If the organic law provided for a change, that might answer all emergencies, especially if it made the majority the

voters. But suppose no such provision, or that the once majority becomes the minority, and deny a voice in the government? What shall then be done? Where lies the sovereignty? In the government as subsisting, or in the whole people? The answer is found in the Declaration of Independence, the Bills of Rights, and all American commentators and jurists. Let this be tested by

American precedents on the right of the People to change Government, and to judge of the occasion.

These were drawn by our fathers from the expounders of true English liberty, and enlarged and improved in American practice.

From Sydney on Government, p. 15:—"We say in general 'He that institutes may also abrogate,' (*cujus instituere, ejus est abrogare,*) most especially when the institution is not only by, but for himself. If the multitude, therefore, do institute, the multitude may abrogate; and they themselves, or those who succeed in the same right, can only be fit judges of the performance of the ends of the institution."

Sec. 16, p. 37—"The constitution of every government is referred to those who are concerned in it, and no other has any thing to do with it."

Chap. 2, sec. 34, p. 71—"Men who delight in cavils may ask, Who shall be the judge of these occasions? (for resuming delegated power,) and whether I intend to give to the people the decision of their own cause? To which I answer, that when the contest is between the magistrate and the people, the party to which the determination is referred, must be the judge of his own case; and the question is only, whether the magistrate should depend on the judgment of the people, or the people on that of the magistrate, and which is most to be suspected of injustice."

Chap. 3, sec. 21, p. 349—"None, therefore, can be judges in such cases but the people, for whom and by whom the consitutions are made; or their representatives and delegates, to whom they give the power of doing it."

Chap. 3, sec. 31, p. 399—"And I say, that nations being naturally free, may meet, when and where they please, may dispose of the sovereignty, and may direct or limit the exercise of it, unless by their own act they have deprived themselves of that right; and there could never have been a lawful assembly of any people in the world, if they had not that power in themselves."

Sec. 33—"If any man ask, how nations come to have the power of doing these things, I answer, that liberty being only an exemption from the dominion of another, the question ought not to be, *how a nation came to be free, but how man comes to have dominion over it;* for till the right of dominion be proved and justified, liberty subsists as arising from the nature and being of a man." "Man, therefore, must be naturally free, unless he be created by another power than we have yet heard of."

Mr. Locke is full to the same point, that the people are the only judges in the last resort. [See Locke on Gov., pp. 399, 400, 401, sec. 240, et seq. Book 2, chap 13, sec. 149.]

Burgh, vol. 1, chap. 2, p. 3—"As the people are the fountain of power, and object of government, so are they the last resource, when governors betray their trust. And happy is a people, who have originally so principled their constitution, that they themselves can, without violence to it, lay hold of its power, wield it as they please, and turn it, when necessary, against those to whom it was intrusted, and who have exerted it to the prejudice of its original proprietors."

Vattel expressly denies the power now claimed for the Rhode Island Assembly, L. N., page 18:—

"It is here demanded, whether, if their power extends so far as to the fundamental laws, they may change the constitution of the State? The principles we have laid down lead us to decide this point with certainty, that the authority of these legislators does not extend so far; and that they ought to consider the fundamental laws as sacred, if the *nation* has not, in very express terms, given them the power to change them. For the constitution of the State ought to be fixed; and since that was first established by the *nation*, which afterwards trusted certain persons with the Legislative power, the fundamental laws are excepted from their commission. It appears that the *society* had only resolved to make provision for the State's being always furnished with laws suited to particular conjunctures; and gave the Legislature, for that purpose, the power of abrogating the ancient, civil, and political laws that were not fundamental, and of making new ones; but nothing leads us to think that it was willing to submit the constitution itself to their pleasure. In short, these legislators de-

rive their power from the constitution ; how then can they change it, without destroying the foundation of their authority ?"

And this was even Rhode Island doctrine in 1787. I cite again the argument of Gen. Varnum, in the case of Trevett vs. Weeden :—

Page 25—"Have the *citizens* of this State ever intrusted their legislators with the power of altering their constitution ? If they have, when and where was the solemn meeting of *all the people* for that purpose ? By what public instrument have they declared it, or in what part of their conduct have they betrayed such extravagance and folly ? For what have they contended through a long, painful and bloody war, but to secure inviolate, and transmit unsullied to posterity, the inestimable privileges they received from their forefathers ? Will they suffer the glorious price of all their toils to be wrested from them, and lost forever, by the men of their own creating ? They who have snatched their liberty from the jaws of the British Lion, amidst the thunders of contending nations, will they basely surrender it to the administration of a year ?"

Page 26—" But as the Legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the *people* ? I answer, the supremacy (consisting in the power of making laws, agreeably to their appointment,) is derived from the constitution, is subordinate to it, and therefore, whenever they attempt to enslave the *people*, and carry their attempts into execution, the *people themselves* will judge, as the only resort in the last stages of oppression."

This and other Rhode Island authorities before cited, demonstrate that the Assembly held no power from the charter or the people, to interpose in the making or altering of constitutions.

I must refer to many of the authorities before me by citing without reading them.

1 Wilson's Works, 383, 417, 419.

4 Elliot's Debates, pp. 498, 506, 507.

Federalist, No. 1, p. 1. Also pp. 52, 87, 149, 150—Gideon's Ed.

2 Dallas, Chisholm vs. Geo., 457.

From the Inquiry into Government, by John Taylor, of Caroline, Va., a masterly work, pp. 447, 497, a single sentence :—

" If a nation surrenders *all its rights* to a *government*, IT CANNOT BE FREE. *Freedom* consists in having rights, beyond the reach and independent of the will of another ; *slavery*, in having none. The form of the master, or his having three heads or one head, does not create the slave. It is on account of the opinions, that nations might be made free by the form of the master, and that the powers of a government are incapable of limitation, that they have been so universally enslaved. Such is the doctrine of the British government and of the British lawyers. The *government* possesses *unlimited* power, and the *nation* has no rights independent of the government. *The reverse of this is the principle adopted by our policy. It contends that the power of a government may be limited, and that the people may have rights independent of the government.*

The idea, that a nation must necessarily be divided between sovereignty and subjection, to form a government, allotting one or a few to the first principle, and the mass of the people to the second, is precisely the barbarous opinion which has always made tyrants and slaves."

All the difficulty with our learned adversaris is, that the constitution in Rhode Island did not emanate from the right source. Hear Mr. Pendleton, President of the Virginia Convention, in 1788 :—

" In the same plan we point out an easy and quiet method of reforming what may be found amiss. No ; but, say gentlemen, we *have put the introduction of that method in the hands of our servants*, who will interrupt it from motives of self-interest. What then ? We will resist, did my friend say ? conveying the idea of force. Who shall *dare to resist the people ? No ; we will assemble in Convention ; wholly recall our delegated powers, or reform them so as to prevent such abuse.*"

Again he says, meeting the objection, that the Convention that framed the United States Constitution had transcended the powers given by Congress and the States, merely to amend the existing confederation, and not to frame a new government :—" *Suppose the paper on your table dropt from one of the planets ; the people found it*, and sent us here to consider whether it was proper for their adoption ; must we not obey them ?"

In Chisholm vs. Geo., 2 Dall., 454, Mr Justice Wilson inquires, " whether the citizens of Georgia have done, as the individuals of England are said, by their late instructors, to have

done, surrendered the supreme power to the state or government, and reserved nothing to themselves; or whether, like the people of other States, or of the United States, the citizens of Georgia have reserved the supreme power in their own hands; and on that supreme power have made the State *dependent*, instead of being sovereign."

Judge Wilson, vol. 1, p. 17, says of changes by the people:—"In other parts of the world, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the *idea of wars*, and the calamities attendant on wars. But happy experience teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind."

Judge Tucker, in his Blackstone, 1 vol., Appendix, p. 10, holds that the union of the government with the sovereignty is treason.

"As the sovereign power hath no limits to its authority, so hath the government of a State no rights, but such as are purely derivative, and limited: the union of the *sovereignty* of a State with the *government* constitutes a state of *usurpation* and absolute *tyranny* over the *people*."

Again he says, vol. 1, part 1, p. 89:—"The people, whenever they see fit, may make any alterations in the constitution which they may deem necessary to their happiness and the prosperity of the nation."

The whole of this doctrine was enforced, seriatim, by Judges Tucker, Tyler, Henry, Roane, and Nelson, the highest court of appeals of Virginia, in 1793, in the remarkable case of Kamper vs. Hawkins, (1 Virginia Cases, p. 20.) There the question incidentally arose, whether the constitution of Virginia, which was framed by an unauthorized Convention, without the forms of law and against the consent of the then existing government, was a valid, fundamental law, paramount to and controlling the Legislature; and all the Judges held the affirmative, and emphatically laid down the right of the people to make constitutions, wholly independent of the permissive act of the Legislature.

The opinions then held by the Judges of the General Court of Virginia, the highest tribunal in that ancient commonwealth, and so near the period of the Revolution, are particularly significant. I will quote briefly from them.

Judge Nelson—"The Legislature derive their existence from the constitution. Who, then, can change it? I answer, the *people* alone."—(pp. 28, 29.)

Judge Roane—"I consider the people of this country as the only sovereign power. I consider the Legislature as not sovereign but subordinate. I consider that at the time of the adoption of our present constitution the British government was at an end in Virginia. But admitting for a moment, that the old government was not then at an end, *I assert that the people have a right, by a Convention or otherwise, to change the existing government, whilst such existing government is in actual operation* for the ordinary purposes thereof. The example of all America in the adoption of the federal government, and that of several of the States in changing their State constitutions, in this temperate and peaceful manner, undeniably proves my position. The people of Virginia, therefore, if the old government should not be considered as then at an end, permitted it to proceed, and *by a Convention, chosen by themselves*, with full powers, established then a constitution. This Convention was *not* chosen under the sanction of the former government, but may be considered as a *spontaneous assemblage of the people* of Virginia, under a recommendation of a former Convention," &c. —(pp. 36, 37.)

Judge Henry—"In the year 1776, the people of this country chose delegates to meet in general Convention. Our deputies proceeded, as of right they might, to prepare that form of government for us they judged best. Accordingly, a plan of government was agreed upon, promulged, and accepted by the people," &c. "Our government is declared to be founded in the authority of the people." Again he says:—"It would be a solecism in government, establishing the will of the Legislature, *servants* of the people, to control the will of their *masters*."—(pp. 46, 47.)

Judge Tyler, speaking of the doctrine of the omnipotence of Parliament or of the Legislature, says it is "an abominable insult upon the honor and good sense of our country, as nothing is omnipotent, as it relates to us, either religious or political, but the God of Heaven and our constitution."—(p. 60.) Of the validity of a constitution, formed by the spontaneous Convention of the people, he says:—"Has not this policy been sufficiently ratified by time and action, and if it were possible to doubt under these circumstances, has it not been *sealed by the blood* of this widely extended empire."—(p. 58.)

Judge Tucker, in tracing the progress of the Revolution and the modes resorted to by the people to form governments, which, he says, made but small progress with the legal assemblies of the colonies, notices "the first introduction of *Conventions;* bodies neither authorized by or known to the then constitutional governments; bodies, on the contrary, *which the constitutional officers of the then existing governments considered as illegal, and treated as such.* Nevertheless, they met, deliberated and resolved for the common good. They were the *people,* assembled by their deputies; not a *legal or constitutional assembly,* or *part* of the *government* as then organized—they were in effect *the people* themselves assembled by their delegates."—(p. 69.) "The power of *convening* the legal assemblies resided solely in the Executive. They could not be *chosen* without writs *issued* by its *authority.* The *Conventions,* on the contrary, were chosen and assembled, either in pursuance of recommendations from Congress, or from their own bodies, *or by the discretion and common consent of the people.* They were held even whilst a legal assembly existed. Witness the Convention held in Richmond, March, 1775; after which period, the legal or constitutional assembly was convened in Williamsburg, by the Governor, Lord Dunmore, and continued sitting until dissolved by him in July."—(p. 70.) "Yet a *constitutional dependence* on the British government was *never denied* until the *succeeding* May, (1776,) nor dissolved until the moment of adopting the present constitution or form of government, on the 29th of June, 1776, five days before the declaration of independence by the Congress of the United States. It was the *voice of the people themselves,* proclaiming to the world their resolution to be free, and to institute such a government as, in their own opinion, was most likely to produce peace, happiness and safety to the individual, as well as to the community." And finally, says this sound and able jurist, "the Convention of Virginia had not the *shadow* of a *legal* or *constitutional form* about it. It derived its existence and authority from a higher source; a power which can supersede all law, *and annul the constitution itself,* namely, THE PEOPLE, IN THEIR SOVEREIGN, UNLIMITED AND UNLIMITABLE AUTHORITY AND CAPACITY."

This very question, so clearly stated by the Virginia Judges at that early day, (two of them at least—Roane and Tucker—among the most learned jurists of the country, and one of them the father of the late President,) was the whole point of difference between the Convention and the Charter Government in Rhode Island. It is a parallel that runs upon all fours. It is not the right of overthrowing government by *physical force,* of which the Judges are speaking, but the right of the people to form or alter government, without the consent of existing government. Thus in Virginia, before the Revolution, while the colony adhered to her allegiance, and before any declaration of independence, a Convention was called, spontaneous, unauthorized, from the midst of the people, and sitting down *beside* the legal Assembly, it framed a new constitution and plan of government, and repudiated the old, and appealed to the people to sustain it. And this was not a principle of *force,* but of fundamental *right;* precisely what Judge Roane affirms as the great American doctrine, viz.: *the right of the people, by Convention or otherwise, to change the existing government whilst it is in actual operation;* and a right to make this change, not by superior strength, but in a peaceful manner, by a Convention chosen by the people themselves; and that too, adds Judge Tucker, although the Convention had not the shadow of a legal or constitutional form about it!

We have seen how Chief Justice Marshall, in speaking for the whole Court, regarded the practical exercise of this sovereignty as a question settled and no longer open in this country, and that he treated it as an original right to be exercised by the people, and not depending upon a statute law to give it effect.

I will close these citations by reference to a standard work, Rawle on the Constitution, from page 14 to 17. He there lays it down as the first duty of society, to form the best constitution possible, and he thus affirms the principle upon which, when found imperfect in practice, it may be changed:—

"Alterations and amendments, then become desirable—*the people retains—the people cannot perhaps divest itself, of the power to make such alterations.* A moral power equal to and of the same nature with that which made, alone can destroy. The laws of one Legislature may be repealed by another Legislature, and the power to repeal them cannot be withheld by the power that enacted them. *So the people may, on the same principle, at any time alter or abolish the constitution they have formed.* This has been frequently and peaceably done by several of these States since 1776. New Hampshire, New York, Pennsylvania, Delaware, South Carolina, Georgia, and Connecticut, have altered their constitutions since that that period." [Note by the author in 1829.] "Several others might now be enumerated. *If a particular mode of effecting such alterations has been agreed on, it is most convenient to adhere to it, but it is not exclusively binding.*"

And now, may it please your Honors, with the utmost deference, permit me to ask, how

could this Honorable Court—nay, how can any *American* maintain, in the face of these authorities and of the sovereignty of the people, to which all at least *pretend* to bow that, in contemplation of law, and in the cognizance of this Court, there can be no *legitimate* change in the constitutions and forms of government, unless the permission to make the change, and the form in which the people shall proceed, is *first* prescribed by an act of the subsisting Legislature ?

What a discouragement to the oppressed millions of the old world would it be, for the "model republic" of America to send forth, as her solemn judicial judgment, a decree in this cause, in favor of unchangeable despotism. What a repudiation of the doctrines and the practice of our fathers, and what a reproach upon their memories. Whatever may be your decision, or no decision in this case, no such result can be apprehended. The theory that government cannot be rightfully changed, except by force of the formal consent of the law-making power, whether in a King or a Legislature, we maintain is wholly anti-American, and is nothing but a dogma of despotism ; and I will now proceed to prove it.

The fundamental distinction between the American principle of POPULAR *government and the European principle of* LEGITIMATE *government, is this.*

1st. In the former *the people are the ultimate source of power, and can change government without a law permitting them to do so.*

2d. In the latter *the reigning dynasty, or at best the Parliament*, is the sovereign power in the State, and the people can make no change in government whatever ; they can only take what is granted, and submit to what is decreed.

The great distinction is the power of *originating and framing*, as well as of accepting. There can be no sovereignty, no direction, no control, without the first. A constitution in Russia depends upon the free will of the Emperor to grant it. Now, if in Rhode Island, or any State of this Union, the forming or changing of a constitution depends upon the *grant* of the Legislature, through a previous permissive law to hold a Convention, where is the difference between the "legitimate" King and the republican Assembly ? The people are equally tied down in both cases. They cannot move without somebody's consent, and if anybody, then he who holds that power of consent in his hands is the sovereign.

The people of Rhode Island could no more change their King, the Assembly, than the Russians can theirs, because the Assembly were landholders chosen by landholders, and refusing suffrage to the great majority. What matters it, whether the Assembly makes or amends a constitution, and asks the people to take it, with the sole power to say yea or nay, and nothing more, or whether a King or a Parliament grants the people a constitution, and compels them to take it or nothing, as is the European custom, when the people demand their rights by a threat of revolution ?

Let the people of this country, whatever else they may yield, NEVER YIELD BY REMOTEST IMPLICATION THE GREAT RIGHT TO ORIGINATE, FRAME, REMODEL AND AMEND GOVERNMENT !

The moment they descend to become mere acceptors or rejectors of amendments emanating from any other source, they are *slaves of government* and no longer sovereign. For this is the vital distinction between the American principle of free institutions, and the European principle of *legitimate* government.

That doctrine is found, very emphatically promulgated, in the proclamation of the HOLY ALLIES, in 1821, to prevent all changes in government that did not emanate from their sovereign will and pleasure ! It was at the period when Naples, Piedmont and the Italian States were struggling against Austria, and enlisting the sympathies of all America, and exciting a general interest in England. That Austria, which, nearly thirty years after that event, is now again the sole obstacle to the freedom of the whole Peninsula ; a power most emphatically the champion of "law and order" when it crushed Poland, and proclaimed that "order reigned in Warsaw !" From such a source came the famous

LAYBACH CIRCULAR.

This paper was the exact prototype of the dogmas now contended for by *one* of the learned counsel for the Rhode Island Chartists, but which he *then*, as I shall presently show, denounced with all the force of his eloquence and all the vigor of his strong intellect.

And what was the Laybach Circular ? I cite the British Annual Register for 1821, vol. 93 State Papers, pp. 559 to 605, inclusive.

The "Holy Allies" met in Congress at Laybach, to put a stop to the revolutions, and crush the liberal principles then extending over Italy and parts of Europe.

May 12th, 1821, they issued "a circular despatch to their ministers at foreign courts affirming these doctrines, viz. :—

"In the name of the Most Holy and Indivisible Trinity, their Majesties the Emperor of

Austria, the King of Prussia, and the Emperor of Russia, solemnly declare," &c. "We have seen burst forth, on more than one side, the effects of that vast *conspiracy* which has so long existed against all *established power*, and against all those rights *consecrated* by that social order under which Europe has enjoyed so many centuries of glory and happiness. The Allied Sovereigns could not fail to perceive that there was *only one barrier* to oppose this devastating torrent,—*to preserve what is legally established*, and which was, as it ought to be, the invariable principle of their policy. Never have these Monarchs manifested the *least* disposition to thwart real amelioration or the reform of abuses which creep into the best governments!"

But, they add—

"*Useful and necessary changes in legislation, and in the administration of States*, OUGHT ONLY TO EMANATE FROM THE FREE WILL AND THE INTELLIGENT AND WELL WEIGHED CONVICTION OF THOSE WHOM GOD HAS RENDERED RESPONSIBLE FOR POWER. All that deviates from this line necessarily leads to disorder, commotions and evils, far more insufferable than those which they pretend to remedy!

Penetrated with this eternal truth, the Sovereigns have not hesitated to proclaim it with frankness and vigor; they have declared that in respecting the rights and independence of all legitimate power, they regard as legally null, and as disavowed by the principles which constitute the public right of Europe, all pretended reforms operated by revolt and open hostility."

In 1823, in the House of Congress, in his manly vindication of the Greek Revolution, Mr. Webster denounced this assumption of the Allies, as to the origin of changes in government, precisely as we now condemn the like dogmas in the Rhode Island Charter Government. [See Webster's Speeches, 1 vol., p. 241.]

"*The substance of the controversy*," said Mr. Webster, "*is whether society shall have any part in its own government.*"—(p. 244.) And that was precisely the controversy in Rhode Island between the landed oligarchy and the people.

"Society," upon this principle," said he, "has no rights of its own. It *takes* good government, when it *gets* it, as a *boon* and a *concession*, but can *demand* nothing. It can rightfully make no endeavor for a change by itself. Its whole privilege is to receive the favors that may be dispensed by the sovereign power, and all its duty is described in the single word *submission*. This principle would carry Europe back again into the middle of the dark ages. It is the old doctrine of the divine right of Kings advanced now by new advocates and sustained by a formidable array of (military) power."—(p. 247.) Again, he says :—"How totally hostile are these doctrines to the fundamental principles of our government. If these principles of the sovereigns be true, we are but in a state of rebellion and of anarchy, and are tolerated among civilized States because it has not yet been convenient to conform us to the true standard." [See the whole speech, from p. 242 to 256.]

Now the Rhode Island question presents the same issue between the right of change emanating from the people or from the established government. Of that doctrine Mr. Webster then said, as he might well say now of the assumptions of the Charter Government over the people of Rhode Island :—"*I want words to express my abhorrence of this abominable principle!* I trust every enlightened man throughout the world will oppose it, and that especially those, who like ourselves are out of the reach of the bayonets that enforce it, will proclaim their detestation of it in a tone both loud and decisive."—(p. 249.)

This detestable doctrine of arbitrary power was denounced with like indignation even in the British Parliament. The ministers were compelled, by the force of public sentiment, to openly disavow any participation in the plans of the Allied Sovereigns.

In the House of Commons, June 21, 1821, Mr. S. Wortley, member from Yorkshire, as if anticipating the American senator, said :—

"What was the result of this? By saying that no reforms should emanate, except from those whom God had made responsible, it could only be meant that no *reform should proceed except from the Sovereigns of States*. He would ask, whether, if such doctrines had formerly been acted upon, we should at this time have possessed any liberty whatever? For what liberty we did enjoy had frequently been obtained by force of arms, and always against the *will of the Sovereign*. This principle would put an end to all reform; and it was the duty of England to take care that the doctrine contained in the despatch was not made the law of Europe. If it were, there would be an end to all hopes of liberty. He believed that the revolution in Naples did not emanate from the people, but was the work of a faction. Austria, however, did not march against Naples on the ground that the revolution was produced by the efforts of a particular sect, which might endanger the tranquility of her States; but in support of the principle, *that no country had a right to effect any amelioration of its political condition, without the consent of its Sovereign.*"

And this he denounced as

"The assertion of the despotic principle, that no nation ought to produce a reform in its government without the consent of its Monarch."

How can our learned opponents take their Charter Assembly out of this category? The parallel with the Laybach Circular is complete, because the Rhode Island argument admits that if the Charter Assembly, (which claimed to be the legitimate source of power!) had authorized the people to hold a Convention, then all that followed would have been lawful. And this is the only distinction between the adoption of the People's Constitution and the resent constitution of Rhode Island.

Now this rests solely on the ground of a power in the Charter Assembly, *inherent, derived* or *delegated*, and irrevocable by the people. But the Assembly had no such *inherent* power. They *derived* it from no authority. It was never *delegated* to them by charter or people; and *how then can* NO AUTHORITY *give authority?* Hence it follows that the action of the Assembly, in assuming the initiative and claiming to hold it, was revolutionary and without color of law, because unauthorized by any fundamental law of the people. In short it was a Legislative usurpation.*

Neither was the learned counsel, who is now here to sustain the weight of the opposite side, so enamored hitherto of the guardianship of Legislatures over people. In his celebrated reply to Mr. Hayne, in 1830, upon the Foote resolutions, he well said—

"Gentlemen do not seem to recollect that the *people* have any power to *do anything for themselves.* They imagine there is no safety for them any longer than they are *under the close guardianship of the State Legislatures!*" [Vol. 1, p. 423, Webster's Speeches.]

And what must he say now? Why, that, after all, the people *have* no power to do anything for themselves, and cannot be trusted even to take the first step to make a constitution, unless they do it "under the close guardianship of the Legislature!"

So far, in fact, was the distinguished senator on that occasion from discovering that the

---

* The counsel could not anticipate Mr. Webster's explanation of his strong *"Dorr doctrine"* in his Greek Speech, in 1823. It was this, as given in that gentleman's argument, revised by himself, and it admits of a conclusive answer. Mr. Webster said—

"But my learned adversary says that, if we maintain that the people—for he speaks in the name and on behalf of the people, to which I do not object—cannot commence changes in their government, but by some previous act of legislation—and if the Legislature will not grant such an act—we do in fact follow the example of the Holy Alliance—the Doctors of Laybach; where the assembled Sovereigns said that all changes of government must proceed from the Sovereign; and it is said that we mark out the same rule for the people of Rhode Island.

Now, will any man—will my adversary here—on a moment's reflection, undertake to show the least resemblance on earth between what I have called the American doctrine and the doctrine of the Sovereigns at Laybach? What do I contend for? I say that the will of the people must prevail when it is ascertained; but there must be some legal and authentic mode of ascertaining that will; and then the people make what government they please. Was that the doctrine of Laybach, pray? Was not the doctrine there held, that the *sovereign* should say what changes shall be made? Changes must proceed from them: new constitutions and new laws emanate from them: and all the people do is to submit. That is what they maintained. All changes began with the Sovereigns and ended with the Sovereigns. Pray, at about the time that Congress was in session, did the Allied powers put it to the people of Italy to say what sort of change they would have? And at a more recent date, did they ask the citizens of Cracow what change they would have in their constitution? Or did they take away their constitution, laws, and liberties, by their own sovereign act? No! All that is necessary here is, that the will of the people should be ascertained, by some regular rule of proceeding, prescribed by previous law. But when ascertained, that will is as sovereign as that of a despotic prince—the Czar of Muscovy, or the Emperor of Austria himself."

Now I submit, with great respect, that this is no answer—of Mr. Webster in '48 to Mr. Webster in '23. The doctrine, which he then wanted words to express his abhorrence of was just this, that changes in the administration of States must emanate *only* from the Sovereigns. This is precisely the definition given of that Circular by *Mr. Wortley*, in his speech in the British Parliament:—"*No* reform should *proceed* except from the *Sovereign.*" Now what is Mr. Webster's distinction? He says "the will of the people must prevail—*when* it is ascertained!" That is the qualification: *when* it is ascertained. The *how*, then, the process of ascertainment, becomes all important. It is the first step. How shall the people take it? May they go alone, singly or in the aggregate? *Neither* is the answer. "*There must be some legal and authentic* MODE *of ascertaining that will, and* THEN *the people make what government they please.*"

Of course, not until "*then*" can the people change government. Now what is this all important "*then*," this "*mode*" of ascertaining that *will* which is to be so *sovereign*, if one can but find it out? Whence is it to proceed? Who is to begin it? At the bottom of the quotation, the learned counsel tells us, "*all* that is necessary *here* (that is, in the United States,) is, that the will of the people should be ascertained *by some regular rule of proceeding, prescribed by previous law!*"

That is "*all!*" Merely that the people cannot act, unless the Legislature make a *previous law*, prescribing how they shall act! And this is Mr. Webster's *sovereignty* of the American people!

Will they be content with it? It is precisely the Laybach sovereignty. The Sovereign there grants a constitution, if he pleases. If he refuses, then the people cannot move. The Rhode Island Assembly, or any other Legislature, *may* grant a constitution, *may* grant a Convention, or *may* submit amendments to the people. But suppose they refuse, as the Rhode Isl and Assembly did for sixty years, What then? Mr. Webster's "*all that is necessary*," viz.: a *previous* law of the Legislature, can never be got, and the people are powerless! "When ascertained, that will is as sovereign as that of a despotic prince!" But when this *sovereign will* knocks at the door of the Legislature, the *creature* of that will shuts the door in its face! It says to it, "you shall *not* be "*ascertained.*" It tells the people "you shall *not* be counted, you shall not have that 'previous law,' and if you stir a step without it, to count yourselves, you are *rebels*, and we will send to the President for all his troops, and all the Militia of the States, to shoot you down as traitors!" Surely, then, the *change* must *proceed* from the sovereign Assembly as well as from the allied Sovereign—and if this be American liberty, we hold it just as the German and Italian States do, or rather *did*, their liberty. The only possible difference is, that the latter must beg a ready-made constitution from their Sovereign, and we must *beg leave to make one* from ours!

people were tied up to emanations of amendments or Conventions from the Legislature, that he held an extreme doctrine which I have never met with elsewhere, except in the speech of Mr. Pendleton, President of the Virginia Convention, in 1788, namely: that the *people* might change even the Constitution of the United States.

"The people," he said, (as a fourth security,) "have seen fit to rely, in case of necessity or high expediency, on their known and admitted power, to alter and amend the constitution, peaceably and quietly, whenever experience shall point out defects or imperfections." [1 vol. Webster's Speeches, p. 424.]

Possibly we might pause here, but surely the author of such a sentiment should not stop short in alarm at the change of a State constitution by the people, barely because the Assembly had not *requested* them to hold a Convention!

How then can the validity of a constitution depend upon the fact whether the Legislature did or did not act first by allowing the people to meet in Convention? On the contrary, we maintain that

Government is subjected to the Sovereignty of the Nation, the People—and not the People or Nation made subject to the Government.

The distinction between ours and old governments is this:—"It places the remedy in the hands which feel the disorder. The other places it in those hands which cause the disorder." [Mr. Carlin in Va. Debates on the U. S. Constitution; 2 Elliot, 104.] It goes on the principle that all power is in the people, and that rulers have no powers but what are enumerated in that paper. [Mr. Lee in do; 2 Elliot, 156.]

Now we find the majority of the people of Rhode Island adopting a constitution. Must it not be treated as an act of the sovereign power? They answer no, because the Assembly refused to request the Convention to meet. Then

The basis of the defendants' proposition is this:—

1. That when any Commonwealth or State exists under an organic law, and has created a Legislature, no Convention, with a view to a change of the organic law by the whole people, can be rightfully held, without the previous consent of the Legislature, however constituted, and whether chosen by a minority or majority of the whole people.

2. That if held without such previous consent, it is revolutionary, and its acts, though ratified by the whole people, invalid, unauthorized and insurrectionary.

In short, that the fundamental law depends upon the Legislature and not upon the people.

The inference from this theory is unavoidable, viz.:—

1. That the Legislature is sovereign, and that however oppressed the majority may be under a system of minority suffrage, no change can take place unless the people conquer it in battle by force, or unless the Legislature grants them leave to assemble in Convention to make a constitution!

2. That if the majority of the people (or if all except a quorum of the Legislature and the Executive) should attempt by force to put down the government, or to change it at all without Legislative consent, this constitutes a case of "domestic violence," which the whole naval and military forces of the Union may be called out to suppress!

3. That there are no inherent liberties in the people, and the entire substance must yield to the mere shadow of form.

Such is not the American theory of government. On the contrary, the preliminary forms in making a constitution are nothing to the substance. "They are but the scaffolding of the building, which is of no further use after the edifice is completed and occupied."

It may be suggested that the People's Constitution is not proved. It is proved by the facts in the record. But how prove a constitution? How does the present constitution of Rhode Island or of any State exist, and how could it be proved? Would it depend upon no one objecting to the present constitution in Rhode Island? It received not 7000 votes; much less than a majority of the whole legal voters under it. The people's party might have objected or may now object. The seal of the State might be abstracted. This is no test of authenticity. The people's officers had their seal. The record shows no seal on either side. In fact the only distinction between the present constitution and the people's, as to authenticity, for the time they were in force or to be in force, is the act of the Assembly calling the Convention, and that was a mere *request*.

Then we must fall back on the system of paramount right. Where is it? Where is *the power behind* all, *beyond* all constitutions? What is outside of the frame of government?

Can a constitution be altered only by its own terms, and in its own forms? Even if this were conceded, it cannot apply to Rhode Island. But if only this were true, then we have made at least *one* step beyond the doctrines of the Laybach Circular. We have made one step in getting constitutions that authorize change.

The doctrine then would be, "All changes in government must emanate from those whom *the constitution* has intrusted with the power to recommend such change." But if it also ap-

plies to the case of Rhode Island, then we have not advanced a step beyond the divine right of Kings—only to the divine right of the King's charter.

They will contend that the American practice has been to make all changes through the organized government. Such is not the fact. It may be convenient, desirable; but it is not the ultimatum, neither is it a rule. It is, at most, a question of concurrence between the people and the government. Where the voters are the great majority, this might be in practical operation sufficient. But suppose they do not concur? Suppose the government gets into the hands of a minority and wont yield? This provision for concurrence does not take away the reserved right of the people to act. *They* give all the validity, and not the act calling the Convention. The form prescribed is mere direction to the agents; not a bar to the people. If the necessity arises, the people may act. It did arise in Rhode Island, and the people acted. The preliminary call, had it emanated from the Assembly, could give no validity or precedent authority, until the people voted on it and confirmed it. The confirmation made it the act of the people. But it would have been just as much their act had they originated the call without the unauthorized *request* of the Assembly.

Where, then, was the sovereignty to institute the preliminary steps in Rhode Island? The Legislature had no power. They could give no power to the people. They had no priority of recommendation. They in fact only *requested.* Hence *the absurdity of defendants' hypothesis is manifest.* They say that the people had no power to move as a body. We show that the Legislature had no power. That the landholders, the legal voters, were the creatures of the Legislature, and they had no power as such to give to the Legislature. Hence it follows, that if neither the people nor the legal voters had power to move only by consent of the Legislature, and the Legislature had no power to grant, then the power was lost, or must be exercised merely as recommendatory, and not as binding, and this involves the absurdity of reasoning in a circle.

The whole force of the argument, that a previous act of the Assembly is indispensable, is to affirm, in the name of the Legislature, as did the Holy Allies in their own, "you shall not have a constitution unless it emanates from our sovereign will and pleasure."

Is it to come to this narrow point, that the people have a *great right,* but are barred from its exercise on the technical plea of want of form? Why, may it please your Honors, this Court have decided, in the case of Prigg vs. Pennsylvania, (16 Pet., 613,) that "in virtue of the constitution (requiring the restitution of fugitives, the owner of a slave is clothed with authority, in every State of the Union, to seize and recapture his slave," and that "this clause of the constitution may be properly said *to execute itself,* and to require no aid from legislation, state or national."

Now, shall this be affirmed of a mere legal right against natural right, and at the same time shall the people be denied the exercise of a great natural and civil right, above law and above constitutions, because it cannot execute itself, in calling Conventions and counting votes, without the aid of a special statute!

If the foregoing positions are well founded, they prove that the *people* in their aggregate capacity, as a political community, are sovereign as to government, and have a right to exercise that sovereignty and to judge of the occasion.

But who constitute the people who hold this sovereignty? Is it the legal voters, the whole body of adult males, or all the human beings in a State? Standing by itself, each community, being independent, may establish its own rules as to qualifications of voters. The question, so circumscribed, would be one of convenience and acquiescence. It could conclude no right of the majority. With this qualification, the States being independent by the Revolution, each might establish the limitations and exceptions it chose to, as to the rule which they all laid down that the sovereignty resided in the people. When they formed the Union and conceded some of the attributes of sovereignty, they yielded nothing on this point, except that the United States were to guarantee to each State a republican form of government. The power to frame their own government, subject only to this limitation, was unrestricted. Each State might adopt its own construction as to the organic law and the rights of voting. It left each State as an independent community, and the question who were the people in that community was to be determined by the community, but subject always to the right of the majority to change the organic law. And however this maxim was restricted in practice, its force was not destroyed whenever the rightful majority chose to act.

Now from what source does the rightful majority spring? Who are the people? To answer this, what was the doctrine promulgated by the American Revolution? There can be but one reply—"That the sovereignty in all the free States was placed in the whole body of the adult male population, with exceptions, and in the other States in the whole body of the free white adult males." There is no case of exclusion of citizens who demanded a voice. The exceptions to the rule in all these States were *those persons not competent to form a contract.* In one class of States, this excluded children under twenty-one years, idiots and insane, strangers and women. In another class of States, slaves are to be added. The reasons of these exclusions it is unnecessary to discuss, because all our governments

were formed without any innovation on this common consent of mankind in all governments. *But if a doubt were raised here, it is no argument in favor of limiting the sovereignty to a less number* than all the adult males. If that argument is good, it is the strongest against their theory. So slaves are excluded for the same reason that minors and incompetent persons are, because by the laws of the community in which they are found, they are incapable of making contracts. They are not citizens, and by no qualifications placed within their reach, can become such.

The case, as applied to Rhode Island, or any State where the minority held the right of suffrage, and the political power, would be parallel, only in case the non-voters were not only excluded for want of qualification, *but could never become qualified !*

The attempt to alarm the South on this point is absurd. It is not necessary, in order to sustain the relation of slavery in the States where it exists, to limit the rights of a majority of a free people, and make them the subjects of a minority. If it were, it would be the strongest possible argument against slavery! Admit it, and it gives no security to the voters. The physical force of the slave to rise upon his master remains the same in either case, and the recognition of the right of the majority of the whole citizens to form government recognizes no more right in the slave to act as a citizen in that organization, than does the opposite doctrine.

Then, having established the position that the majority have the right to change the form of government, what is the quality of this political right ?

Clearly it is to be distinguished from mere physical force, or superiority of military skill or strength; for political power is political right. Power and right are convertible terms when the law authorizes the doing of an act which shall be final and for which the agent is not responsible. [The People vs. Croswell, 3 Johns. Case, p. 345 ; Argument of Hamilton.]

The right to exercise a power is a consequence of the possession of the power. But mere physical or military power is not necessarily either political right or moral right. The distinction is clear between a mere right of revolution resting on physical force, and a right of a majority to change government in the exercise of that political sovereignty which the majority of community embodies. "The people have given to the general government such powers as in their judgment were compatible with the general compact. And they have reserved those rights and sovereign authorities which they did not choose to delegate." [Martin vs. Hunter's Lessee ; 1 Wheaton, 324.]

In their capacity as the community composing a State, the people have conceded nothing which is not expressly delegated. This is a conservative principle in all popular government, and is a necessary check upon government in order to preserve republican forms.

To avoid the force of this reasoning, those who have opposed the People's Constitution in Rhode Island, have usually conceded what they call the "sacred right of revolution," as if by that concession they gave the people all the rights it would do to trust them with. And having conceded this much, they make the right of revolution depend upon success, and thus resolve the whole right into physical force.

This may be a correct view as applied to recognitions between independent governments, but how will it apply to our congress of nations, called the United States ? Before the confederation, this right, or rather power, (for if its quality depends upon *success* or *defeat*, it is no right,) existed, as it now does in Russia or France ; but

What is the right of Revolution as applied to a State of this Union ?

Even if the right of revolution is conceded, in what practical form does it exist under our institutions ?

If by revolution is meant overthrowing the existing government and setting up another by military force, this is no political right. In this form, the same right exists to revolutionize for monarchy as for republicanism. It can only be a natural and physical right, the right of minorities as well as majorities. It exists in every despotic or monarchical government.

It was proclaimed in the Declaration—looking, however, to a new source of sovereignty in the people. A revolution in government, not like that of 1688, which was only a revolution in men and dynasties. But in the American system, in opposition to the European, the *moral* was first combined with the physical and natural right to resist oppression. It became a voting as well as a fighting right. "It is the right of the people to alter or to abolish government, and to institute new government."

The Confederation of 1777 left the right of revolution in each State, except so far as limited by the pledge of perpetual union, and prohibiting each State from engaging in war without the consent of Congress. The Constitution of the United States went farther. It explained and reduced to practice the right of change of government recognized in the Declaration. It secured the right of the people peaceably to assemble, and to keep and bear arms.

It left to them all rights not conceded. It gave to Congress the power of calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion, and to declare war; but no State to engage in war unless invaded. It required the United States to guarantee to every State in this Union a republican form of government, and protect each of them against invasion, and (on application of the Legislature, &c.,) against "*domestic violence.*"

And here we are met with the objection, that the revolution in Rhode Island, though perfected by voting and legislating, yet not having been sustained by military force against the old government and the threats of the President, it became rebellion, insurrection and domestic violence. So that, the moment they give us the right of revolution, they send the President, at the head of all the troops of the United States, to suppress it.

This phrase "domestic violence" becomes most important in the construction of this highest of all State rights, the right to model and remodel its own local institutions. We contend it can only mean resistance to the statute or common law of a State, and hence there was no case of domestic violence in Rhode Island, except on the part of the men of the old government against the new. It was no case of domestic violence, because

First. The whole people there had a right to participate in government It was not a question between slaves and masters, subjects and sovereigns, but between the majority of the citizens who possessed every civil right except that of voting, unless they could buy land of the landholders; and the minority who held the land and restricted suffrage.

Second. In point of fact there was no violence and no act done against existing laws of the old government until the new constitution was adopted.

Third. In point of fact the new constitution was adopted by a majority of the legal voters in Rhode Island.

This fact renders it unnecessary to consider the question of domestic violence as applied to the body of non-voters in a State forming a new government, aside from the action of the voters. We do not admit that the people could have been restrained by laws forbidding their meeting, but this is another question, and we need not consider its effect. It is enough that all their acts were within existing laws, until the new government went into effect. Then it was too late to interfere.

Now if "revolution" in a State of this Union necessarily involves a case of "domestic violence," this right of revolution is held by the whole people of a State, subject to the arbitrary will of the Governor, or the quorum of a Legislature of a State, and the President of the United States. This would make all State institutions subservient, in effect, to the military power of the President. If the Legislature are to determine, in the first instance, whether a movement of the people is revolution or "domestic violence," then the right of revolution is made to depend upon the Legislature. This brings back the sovereign power in subserviency to the Legislature, for "the Legislature will always make the power it wishes to exercise." [1 Ell. Deb., 507. Governeur Morris.

Thus if the Governor or the Legislature construe a case of revolution to be an act of "domestic violence," then it rests with the President to call out the whole military power of the Union to suppress revolution in a single State.

So far as insurrection in a State against the laws of the United States is concerned, it was held by Chase, Justice, in the case of Fries, that if a body of people conspire and meditate an insurrection to resist the execution of a statute of the United States, it is a misdemeanor; but if they carry the intention into execution by force, it is treason.

So of a military expedition to overturn the government of the United States in a Territory, it was held in exparte Bollman and Swartwout, that a design to overturn the government of the United States in New Orleans, by *force,* if carried into execution, would be treason. And if the government established by the United States in any of its Territories was to be revolutionized by *force*, the design was treasonable. [4 Cranch, 75.]

As to the power of the President in such cases, see Act of May 2, 1792; U. S. Statutes at large, 264; Act of Feb. 28, 1795; Ibid, p. 424; Martin vs. Mott, 12, W. 19]

The point there decided is that the President, in such case, may call out the militia and they must obey. It goes only to the belief of the facts presented to him, whether true or false, and his decision upon the exigency, (the casus fœderis) but does not judicially affect the fact, nor conclude the parties as to whether they were engaged in insurrection; but if it brings the whole military force of the United States upon them, it puts them down for the time being, though they may be in the exercise of what is conceded as the "sacred right of revolution."

This presents the question as to what is the practical value to the people of the States, of the right of revolution, which is conceded by those who deny the right of the people to change government, without the previous consent of the Legislature. If in conceding that right, they reserve the power in the Legislature to call it insurrection or domestic violence, and the power of the President to call out the militia by his mere will, the right of the majority is shrunk into the will of a minority Legislature, and the caprice, mistake, impulse, or ambition of the President. It is a right that can, upon such construction, be maintained suc-

cessfully only against the whole military force of the Union. Such a construction would be to legalize civil war and disunion. If the President should send his troops to invade a State when changing its form of government, public opinion would enlist the people of other States to join in resisting such invasion; and civil war would blaze through the Union. Suppose a re-election of the President depending on the vote of a State or two where the Legistature desired his re-election and the people were against it, and a call to disperse the voters at the polls?

The order of the President to call out the militia might protect the militia; but the order must issue from the President, in conformity to law, and must be executed by officers duly commissioned, through all the forms of law, or it would be no justification. And if an unreasonable interference with State rights, it would never be submitted to by the rest of the Union to crush a single State.

This discretionary power of the President can be rightly or safely construed only as applying to resistance to State or United States laws; plain insurrection and rebellion. At best, it is a dangerous power, and the most alarming Executive prerogative in our institutions, and public opinion would go far to restrain it.

But it need not be considered in reference to the Rhode Island question. However dangerous the power, the President did not exercise it in any form to give effect to his constitutional right of decision as to the existing cause; and in any event, his acting with either of the two Legislatures would decide nothing as to their constitutional or legal right, and conclude nothing. The threat of interference and of military demonstration, may have compelled the people to abandon the further support of their government, but the President did nothing under the provisions or sanction of the constitution. All his acts were private and never consummated. In his message to the House of Representatives, April 10, 1844, the President says:—

"I have to inform the House that the Executive did not deem it his duty to interfere with the naval and military forces of the United States, in the late disturbance in Rhode Island—the Executive was at no time convinced that the *casus fœderis* had arisen which required the interposition of the military power." [House Doc. No. 225, of 1844, 1st Session, p. 2. Burke's Report, p. 52.]

This view has been followed out to test the practical value of what is called the right of revolution in the people of a State of this Union. It fails, and we fall back upon the great conservative right of the people: the American doctrine of popular government, viz: that peaceful changes of government are provided as the substitute of violence and bloodshed, "for the people possess over our constitutions control in *act* as well as in right." [3 Wilson, p. 293.]

The right is left to the people in each State peacefully to reassume the powers of government, whenever it shall become necessary to their happinesss—" and to institute new government, laying its foundation in such principles and organizing its power in such form as shall to them seem most likely to effect their safety and happiness." This right the people have never surrendered, but if they have only the right of the strongest, nothing is gained over old forms of government.

They may *begin* government better, but if there is a mistake and the power gets into the hands of the minority there is no remedy. It is not so. The people have the right to progress as well as to begin. The pyramid does not stand upon the apex, but the base.

"The greatest improvement on political institutions is a written constitution," says the Supreme Court in Marbury vs. Madison. [1. Cranch, 137.]

This distinction between mere revolution and the American right of change in government, is well defined in the great debate in the United States Senate, in 1837, on the admission of Michigan.

Mr. Calhoun there said "he had never denied the right of revolution. All our institutions rest on that right. A Convention of the people has power to put up and throw down every form of government, but that is par excellence, revolution. [Debates 1837, p. 313.] But—

Mr Buchanan asked—"Is it the position that if in one of the States of this Union, the government be so organized as utterly to destroy the right of equal representation, there is no mode of redress but by an act of the Legislature authorizing a Convention or by open rebellion? Must the people step at once from oppression to open war. Absolute submission or absolute revolution?" *Is there no middle course?* This is found only in the principle established by the whole history of American government, that the people are sovereign, and that a majority of them can alter or change their fundamental laws at pleasure. This is neither *rebellion* nor *revolution*. It is an essential, recognized principle in all our forms of government."

This we hold is the true doctrine of American liberties. We deny, emphatically, that in changes of government, the people of the States, in this Union, hold the "sacred right of revolution," subject to be hanged for treason if they fail? This is the right of serfs and slaves. American citizens claim a higher right, unalienable and practical as a great political right. Not a mere physical right of revolution by force, which whenever resorted to must be at the risk of all the penalties attached to an unsuccessful resistance to established authority.

If then, the people of a State are practically denied a change by revolution, and can get no change without the previous consent of the Legislature, the *Legislature* and *not* the people are sovereign in government; and in practice, whatever may be our theory, we are not a free people. Such a conclusion proves that the premises from which it follows cannot be well founded.

American Practice in Government.

This brings us to the last subject of inquiry, viz: the practice under our forms of government. Here the burden of proof is on those who deny the right, to show when and how it has been restrained. We are not bound to show a case precisely like that of Rhode Island, because, except in that state, no minority government excluding the majority of free white persons, has ever existed among the States. But we go farther and show that the whole practice of American government has conformed to and sustained our theory, viz:

First. In the earliest transitions from Colonies to States, this fundamental doctrine was recognized and acted upon.

Second. It is embodied in all the State constitutions, with three exceptions, from Virginia in 1776, to Iowa in 1846.

Virginia.—"A majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish [government]in such manner as shall be judged most conducive to the public weal. [Bigelow's Constitutions, p. 244.]

Iowa.—"Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same whenever the public good may require it." [Ibid, p. 497.]

Third. American commentators, prior, contemporaneous and subsequent, have uniformly recognized it.

Fourth. All American adjudication affirms it, and no tribunal (except in Rhode Island) ever denied or doubted it.

Fifth. The Convention to frame the Constitution of the United States acted upon it, and the validity of that constitution rests in subsequent ratification without any precedent authority to frame it.

The Bills of Rights in all the State constitutions furnish most conclusive proof of the uniform understanding and intention of the framers of American constitutions to reserve to the people the right of change independent of any power created by the constitution. The whole argument might be rested here, and it would be impregnable, unless we ascribe the utmost folly and falsity to the original founders of American government.

In a series of seventy years in the formation of American government, thirty constitutions have been made by Conventions and seventeen of these constitutions have been remodelled by Conventions. During the Revolution, nine of the Colonies established constitutions and plans of government, through Conventions, not only without the consent but in opposition to the existing government. This established the American precedent in practice. All other Conventions to amend existing constitutions have been called through the Legislatures, which have never refused to make an act for the purpose with or without authority. The Rhode Island Assembly is the only case on record of a refusal to call a convention, and upon that refusal the exigency arose, as it would have arisen in any other State, for the people to resume their powers of government and call their own Conventions. Fourteen States have remodelled their first constitutions through Conventions. If the Legislatures had refused to call Conventions, can any one maintain that no change could have taken place in the old constitutions? Show us then a precedent in which the Legislature of a State has *refused* to pass the forms of calling a Convention, and kept the people at bay and prevented the majority of free adults from forming or amending the constitution, and this state of things has been submitted to; or if no such precedent can be shown, then the principle of the right of change remains intact, "in the people, (as Roger Williams says) whom they must needs mean *distinct* from the government set up"

And this principle of the right of change is not in the "*legal* people," as some vaguely call the voters created by the law, because all the constitutions say it is *inherent* in the people and of course not created by statute.

Again, what mean these solemn recognitions of this "sovereign and original foundation of government?"

Our adversaries point to the provisions for amendment, and say, "there; you must do it in that way and no other — the people have limited themselves and can only act by and through a statute law such as they prescribe in the constitution!"

Our answer is, all these provisions limit the Legislature and not the people: and to prove this we point to these constitutions which contain in their declarations of rights, either immediately preceding or following the provisions for amendment, the affirmation of the right of the people at all times to alter or reform government. There are twenty-nine State

Constitutions, and every one of them, except three, (Georgia, Louisiana, and I am sorry to say that the recent constitution of New York,) contain this solemn affirmation of a fundamental right to change government.

Now to say that this means *nothing*, is to stultify the founders of these constitutions. But to say that the amendment each of these constitutions provides through the Legislature is the only way they can be amended, except by revolution or bloodshed, is to affirm that the Bill of Rights is a mere repetition of the provision for amendment by Legislative action.

Nine of the old thirteen made constitutions during the Revolution. Their Bills of Rights would be the most emphatic exposition of the earliest American practice as to changes of government.

New Jersey July, 2, 1776, adopted an imperfect plan of government, declaring that all the powers of the kings of England over the Colonies was by compact derived from the people ; but it was also provided that this constitution should be void whenever Great Britain should take the Colonies again under her protection. *Virginia*, July 5, 1776, gave the first independent American model. She left all with the people, and gave no power to the Legislature even to propose amendments. *Maryland*, August 14, 1776, followed the example of Virginia, and declared "that all government of right originates from the people," and "whenever its ends are perverted, the *people* may and *of right ought* to reform the old or establish a new government."

So said *Delaware* Sept. 20, 1776—that "whenever public liberty is endangered by the *Legislative* power, singly, or by a combination of the Executive and Legislative power, the *people* may and of right ought to establish a new or reform the old government." *N. Carolina*, Dec 18, 1776, to this point. *New York*, in her first constitution remembered the people, April 20, 1777. *Massachusetts* very emphatic, March 2, 1780, "the *people* ALONE have an incontestible, unalienable and indefeasible right to institute government, and to reform, alter or totally change the same." *Vermont*, in 1786. Then came even South Carolina in 1790, and so on down to the last State in the Union.

Again I ask, where, in one of these constitutions, is it said that the people shall not make or amend it, unless the Legislature first pass a law for it ? And were all these solemn reservations omitted in every constitution, as they unwisely have been in that of New York, still it would take nothing from the people. Mr. Hamilton, speaking of the use of a Bill of Rights in the United States Constitution, says :—

"It is evident, that according to the primitive signification (abridgment of prerogative in favor of privilege,) they have no application to constitutions professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, *the people surrender nothing, and as they retain everything, they have no need of particular reservations.*" [Fed. No. 83, p. 346.]

We have already seen how *Virginia* formed her constitution, by delegates spontaneously chosen and assembling and acting at the same time the old Legislature was holding its sittings. *Massachusetts* made her constitution with a distinct repudiation of the intermeddling of the Legislature. It is an instructive reminiscence, and I must beg leave to quote it from

Shattuck's History of Concord, in Massachusetts.

Page 127, chap. 8—" On the first of October, 1776, the town was called upon to act on the question, 'whether it would give its consent that the House of Representatives with the Council should enact a constitution or form of government for this State.' The subject was referred to a committee, consisting of Ephraim Wood, Jr., Nathan Bond, Col. James Barrett, Col. John Buttrick, and James Barrett, Esq., who reported the following resolves which were unanimously accepted by the town.

Resolved, 1. That this State being at present destitute of a properly established form of government, it is absolutely necessary that one should be immediately formed and established.

2. That the supreme Legislature, in their proper capacity, are by no means a body proper to form and establish a constitution or form of government, for reasons following, viz: 1. Because we conceive that a constitution, in its proper sense, intends a system of principles established to secure the subjects in the possession and enjoyment of their rights and privileges against any encroachment of the governing party. 2. Because the same body that forms a constitution have of consequence a power to alter it. 3. Because a constitution alterable by the supreme Legislature is no security at all to the subject against the encroachments of the governing party on any or all their rights and privileges.

3. That it appears to this town highly expedient, that a Convention or Congress be immediately chosen to form and establish a constitution, by the inhabitants of the respective towns in the State, being free and twenty-one years of age and upwards, in proportion as

the representatives of the State were formerly chosen : the Convention or Congress not to consist of a greater number than the House of Assembly in this State heretofore might consist of, except that each town and district shall have liberty to send one representative or otherwise, as shall appear meet to the inhabitants of this State in general.

4. That when the Convention or Congress have formed a constiution, they adjourn for a short time, and publish their proposed constitution, for the inspection and remarks of the people of the State.

5. That the House of Assembly of this State be desired to *recommend* to the inhabitants to proceed to choose a Convention or Congress for the purpose above mentioned, as soon as possible."

Notwithstanding these wholesome instructions, a constitution was made by the General Court and sent to this town ; but it refused, June 15, 1778, unanimously, to accept it, for reasons above mentioned.

All the towns in Massachusetts followed the example of Concord, and rejected the constitution which the Legislature had presumed to form without asking the people. Subsequently Delegates were chosen to a Convention which made and submitted a constitution that was adopted by the people.

The precedent under the 5th proposition is equally conclusive. The Convention that framed the Constitution of the United States had not a particle of previous authority, and expressly violated the compact of the Confederation. This will be seen by reference to the

Act of the Congress of the Confederation of 1787 *calling the Convention.*

Feb. 21, 1787. "Resolved that in the opinion of Congress it is expedient that on the second Monday in May next, a Convention of Delegates, who shall have been appointed by the several States, be held at Philadelphia *for the sole and express purpose of revising the articles of Confederation*, and reporting to Congress and the several Legislatures *such alterations and provisions therein* as shall, when agreed to in Congress and confirmed by the States, render the federal constitution adequate to the exigences of government and the *preservation* of the Union." [4. Elliot's Debates, old ed., 24. App. 224. Secret Journal, Wait's Boston ed. of 1819.]

The State Legislatures severally elected the Delegates to this Convention, under this recommendation, "*for the sole and express purpose of revising the articles of the Confederation.*" None of the eleven States that went into Convention gave powers beyond revision, alteration and further provisions. [See Secret Journal, pp. 20 to 28.] The Convention disregarded the resolution of Congress, and of the Legislatures, and framed an entire new form of government, to be submitted to the people for their ratification; and, Sept. 28, 1787, the report of the Convention was sent by Congress to the Legislatures to be submitted to a Convention of Delegates chosen in each State, *by the people thereof*, in conformity to the resolutions of the Convention. [Secret Journal, p. 395.]

Suppose Congress had refused to act, and the constitution had been adopted by the people of the States ? Would it not have been in force ? The style of all the State Conventions in adopting the constitution was, "We, the delegates of the people."

The same objections were made to the want of power in that Convention, as are now urged against the Rhode Island Convention. Mr. Madison conclusively answered both in the 40th No. of the Federalist, p. 158. He says that the view the Convention took was this :

"That in all great changes of established governments, *forms ought to give way to substance ;* that a rigid adherence in such cases to the former would render nominal and nugatory the *transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness ;'* since it is impossible for the people, spontaneously and universally, to move in concert towards their object ; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic, respectable citizen, or number of citizens. They must have recollected, that it was by this irregular and assumed privilege, of proposing to the people plans for their safety and happiness, that the States were first united against the danger with which they were threatened by their ancient government ; that committees and congresses were formed for concentrating their efforts and defending their rights ; and that *Conventions* were *elected* in the *several States* for establishing the constitutions under which they are now governed. Nor could it have been forgotten, *that no little ill-timed scruples, no zeal for adhering to ordinary forms*, were anywhere seen, *except in those who wished* to indulge under *these masks their secret enmity to the substance contended for.* They must have borne in mind, that as the plan to be framed and proposed was to be submitted to *the people themselves*,

the disapprobation of this supreme authority would destroy it forever : *its approbation blot out all antecedent errors and irregularities.*"

From this eminent precedent, we pass to the admission of States into the Union. Kentucky in 1787, and Tennessee in 1796, both were admitted with constitutions made without any previous legislative authority; [1 Vol. Amer. St. Papers, 147,] Illinois in 1818, Arkansas and Michigan in 1836, formed constitutions and elected senators and representatives, while they were territories, and without any legal authority whatever, but Congress, in full deliberation, admitted them as States, recognized their constitutions, and received the senators so elected without sanction of law.

The admission of Michigan in 1836

Covers our whole case. Congress had prescribed the boundaries with which Michigan was to be admitted and had authorized the Territorial Legislature to call a Convention. That Convention rejected the terms and dissolved, and the Legislature refused to act. The people took it up, precisely as in Rhode Island, and in Convention adopted the constitution with the boundary prescribed by Congress. In this form the subject came before Congress through the message of President Jackson, Dec. 27, 1836, approving this action of the people independent of the Legislature. He there says :—

"This latter Convention was not held or elected by virtue of any Act of the Territorial or State Legislature : it originated from the people themselves, and was chosen by them in pursuance of resolutions adopted in primary assemblies, held in the respective counties." [Gales & Seaton's Deb. in Cong. Vol. 13, Part 1, p. 1164.]

An animated and able debate ensued. In the Senate, Messrs. Calhoun, Morris, Ewing, Bayard, Davis of Massachusetts, and Preston, opposed the admission. Messrs. Grundy, Buchanan, Benton, Tipton, Walker, Dana, Crittenden, Fulton, King of Georgia, Brown, Niles, and Strange, vindicated the primary sovereignty of the people. The whole discussion may be found in the volume above cited, Jan. 1837, from page 206 to 322, and the doctrines we now contend for prevailed by a vote of 25 to 10. [Also Congressional Globe and appendix for 1836, 1837, page 66 et seq.] The question then raised by the opposition was thus stated by Mr. Morris. "The question is:—*will Congress recognize as valid, constitutional and obligatory, without the color of a law of Michigan to sustain it, an act done by the people of that State in their primary assemblies, and acknowledge that act as obligatory on the constituted authorities and Legislature of the State ?*" And Congress said yes. Mr. Senator Ewing was as greatly troubled about the want of legal form to meet and count the votes, as are our learned opponents in the case of Rhode Island. "What evidence," he asked " *had the Senate of the organization of the Convention ? Of the organization of the popular assemblies who appointed their Delegates to that Convention ?* None on earth. *Who they were that met and voted, we had no information. Who gave the notice ? And for what did the people receive the notice ?* To meet and elect ? *What evidence was there that the Convention acted according to law ? Were the Delegates sworn ?* And if so, they were extra judicial oaths, and not binding upon them. *Were the votes counted ? In fact, it was not a proceeding under the forms of law, for they were totally disregarded.*"

Senator Buchanan replied "that this was emphatically an act of the people in their sovereign capacity. It was a question over which their servants, the members of the Legislature, had no control." It was said that, "If the Legislature of Michigan had passed a law authorizing this Convention, and fixing the time and place of its meeting, then its proceedings would have been regular and valid. *But who gave the Legislature of Michigan this authority ? Is it contained in the Constitution of the State ?* This is not pretended. *Whence then shall we derive it ?* How does the Senator escape from this difficulty ? *Upon his own principles it would have been a legislative usurpation ;* and yet he says, if the Legislature had acted first, the Convention would have been held under competent authority. Now, for my own part, I should not have objected to their action. It might have been convenient, it might have been proper, for them to have *recommended* a particular day for holding the election of Delegates, and for the meeting of the Convention. *But it is manifest that as a source of power to the Convention, legislative action would have been absurd.*"

P. 75. Again. "We are told in that sacred and venerated instrument which first proclaimed the rights of man to the world, that 'all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves, by abolishing the forms to which they are accustomed.' But suppose the case of a State, whose Constitution, originally good, had, from the lapse of time, and from changes in the population of different portions of its territory, become unequal and unjust. Suppose this inequality and injustice to have gone to such an extent that the vital principle of representative republics was destroyed,

and that the vote of a citizen in one county of the State was equivalent to that of six citizens in another county.

"Why, sir, even under such circumstances, I should bear with patience while hope remained. I would solicit, I would urge the minority, I would appeal to their sense of justice, to call a Convention, under the forms of the constitution, for the purpose of redressing these grievances; but if, at last, I found they had determined to turn a deaf ear to all my entreaties, I should then invoke the peaceable aid of the people, *in their sovereign capacity*, to remedy these evils. They are the source of all power; they are the rightful authors of all constitutions. They are not forever to be shackled by their own servants, and compelled to submit to evils, such as I have described, by the refusal of their own Legislature to pass a law for holding a Convention. Whoever denies this position condemns the principles of the Declaration of Independence, and of the American Revolution. There is not one of the old thirteen States, (Rhode Island might be excepted,) whose governments were not called into existence upon these very principles. It is now too late in the day in our favored land, to contend that the people cannot change their forms of government at pleasure."

Again. Page 147 of Appendix. (Mr. Buchanan in reply to Mr. Calhoun.) "But what is the proposition which lies at the very root of the Senator's whole argument against the bill? I understand it to be, that when any Commonwealth exists under an organic law, and has by it created a Legislature, without the previous assent of that Legislature no Convention can be rightfully held within its limits, and that if such a Convention should be held, the movement would be revolutionary, and its edicts in their very nature would be unauthorized and tyrannical.

"If this proposition be universally true, then it follows as a necessary consequence, that no matter to what extent the regularly organized government of a State or Nation may be guilty of tyranny and oppression, this very government must first give its assent before the people can hold a Convention for the redress of grievances, or, in a word, can exercise the unalienable rights of man. The fate of the people, it seems, must forever depend upon the will of the very Legislature which oppresses them, and their liberties can only be restored when that Legislature may be pleased to grant them permission to assemble in Convention. I had not supposed that any such proposition would ever be seriously contended for in this chamber. It is directly at war with the Declaration of American Independence."

To this Mr. Calhoun replied that he granted the "right of revolution."

But *now* it seems the people are to be taught what this right means by the Rhode Island case, in which the whole military power of the Union is to be called in by an abolished minority government to put down the majority if they attempt revolution!

Mr. Strange, N. C. "Every State in the Union, so far as Congress is concerned, has a right to hold Conventions according to their pleasure, and when assembled in Convention, to prostrate their executive, legislative and judicial bodies, and to put up others in their stead, provided, in so doing, they adhere to the republican form of government." "The authority," says Mr. Madison, in his celebrated report, "of constitutions over governments, and of the sovereignty of the people over constitutions, are truths which are at all times necessary to be kept in mind."

In the House the argument as well as the vote (132 to 43) sustained these principles. [See Globe Appendix, as above, p. 131 et seq. Also Gales and Seaton's, vol. 13, part 2d, p. 1434 et seq.

Mr., now Judge, Vanderpoel, of New York, said:—

"But it had been urged that although the people are sovereign, they can only act through a legal organization, when they undertake to change their organic law; that is to say, through the medium of forms and regulations, as to *time and manner*, prescribed by their Legislature. This doctrine, (said Mr. V.,) is contrary to the whole theory and spirit of our institutions. It puts the servant above his master—the creature above its *creator*. According to this doctrine, if the people are suffering grievances, be they ever so intolerable, and their law-makers do not take the incipient steps towards remedying them, the people in their sovereign capacity are entirely impotent. The idea that every peaceable movement of the people to change their organic law, is a factious or rebellious movement, is indeed monstrous."

Mr. Toucey of Connecticut—

"*It is said, that a majority of the people of a State cannot alter an existing Constitution, unless it be in a manner pointed out by that constitution, or in pursuance of some provision of law.* Sir, I cannot consent to this proposition. It is at war with the fundamental fact of political science, at least as understood in America: the supreme power of the people—their

right to govern themselves. Is there a man in this country who will deny that the people are the source of all political authority? If they are so, then the exercise of it is by their consent, and requires their consent. Consent of whom? Of every man? Of a unanimous people? That were impossible. *Of necessity the majority must give that consent.* And when given, it continues until withdrawn. Otherwise, *the supreme power* is in the *minority*, and however small that minority, even if it be a single man, the right is the same. The fundamental principle of a representative republic is abandoned; the sovereignty of the people, the right of self-government, is abandoned—and an oligarchy, or tyranny in some other form, is established."

The recent case of New York.

The constitution *made* as well as adopted by the people of New York, as late as 1846, affirms all that the people of Rhode Island contend for, and cannot be fairly answered on the other side.

First, we have the then existing constitution of 1821, requiring two-thirds of each branch of the Legislature, at two sessions, to propose amendments; and this was the whole power given to the Legislature on that subject.

Then came a movement wholly outside of the constitution, "an act *recommending* a Convention of the people," passed May 13, 1845, chap. 252. It prescribed the mode of electing Delegates, but it had no more the force of law than the recommendation and mode prescribed by the People's Convention in Rhode Island. This is the point in this cause, and this has been judicially settled by the highest legal tribunal in New York.

The argument on the other side, unless the people's sovereignty is denied, must narrow itself down to the single point, that you cannot have a constitution without a previous law to collect and count the votes. Now a law must be constitutional, or it is no law. Then if the Legislature of New York or of Rhode Island had no power, under the constitution, to provide the mode of calling a Convention and counting the votes, the act to that effect was no law at all, and the constitution made under it, was made "without the forms of law."

This renders the case in New York precisely parallel with the case in Rhode Island. The Supreme Court of New York decided that the act calling the Convention was unconstitutional and void, and that all its force came from the subsequent ratification of the people. Here, then, was no exercise of legislative power by the Assembly of New York, and their act being void in itself, constituted no authentic mode of ascertaining the will of the people. It might as well have come from a self-called Convention as from the Legislature. I now refer to the opinion of all the Judges of the Supreme Court of New York, delivered April 14, 1846, No. 181 of Legislative Documents.

Subsequent to the act advising the Convention, a new apportionment was made which enlarged representation, and the Supreme Court were called upon for their opinion, whether the Legislature had any power to alter or amend the law calling the Convention, so as to increase the number of the Delegates; the question having in the mean time been submitted to the people, who had voted to adopt the recommendation for holding a Convention. On this point the Court held that—

"A power has been given to the Legislature to propose amendments to the constitution, but no power has been delegated to the Legislature to call a Convention to revise the constitution. That is a measure which must come from, and be the act of the people themselves. Neither the calling of a Convention, nor the Convention itself, is a proceeding under the constitution. It is above and beyond the constitution. Instead of acting under the forms and within the limits prescribed by that instrument, the very business of a Convention is to change those forms and boundaries as the public interest may seem to require. A Convention is not a government measure, but a movement of the people, having for its object a change, either in whole or in part, of the existing form of government. As the people have not only omitted to confer any power on the Legislature to call a Convention, but have also prescribed another mode of amending the organic law, *we are unable to see that the act of* 1845, *had any obligatory force at the time of its enactment. It could only operate by way of advice or recommendation, and not as a law.* It amounted to nothing more than a proposition or suggestion to the people to decide whether they would or would not have a Convention. That question the people have settled in the affirmative, and *the law derives its obligation from that act, and not from the power of the Legislature to pass it.*

"If the act of the last session is not a law of the Legislature, but a law made by the people themselves, the conclusion is obvious that the Legislature cannot annul it, nor make any substantial change in its provisions. If the Legislature can alter the rule of representation, it can repeal the law altogether, and thus defeat a measure which has been willed by a higher power. A change in the fundamental law, when not made in the form that law has prescrib-

ed, must always be a work of the utmost delicacy. Under any other form of government than our own, it could amount to nothing less than a revolution."

This was the clear, unequivocal opinion of the Supreme Court, and thus, if our learned opponents seek to distinguish the New York Convention from the Rhode Island movement, on the ground that in the former case there was a previous act of the Legislature, they are answered by the judgment of the Court, declaring that assumed act null and void. Hence it derived all its force from the acts of the people, and so did the form prescribed by the People's Convention in Rhode Island for ascertaining the will of the people.

[Mr. Justice NELSON here remarked that the Legislature of New York did amend the act and enlarged the representation, against the opinion of the Court.]

Then, may it please your honors, the amendment also was no law, and only became such by the ratification of the people ; and this, it is submitted, makes the case still stronger for the people, because, unless their ratification alone made the Convention lawful, it was utterly void, and the constitution made by it is no constitution, because the Legislature not only went beyond the constitution, but against the judicial construction of their own power under the constitution.

The Danger of this Right in a conservative point of view.

And now, *may it please your honors*, if there be any force in history, precedent, practice and principle, in our forms of government, enough has been said and cited to establish the right of a majority of the people of Rhode Island to do precisely what they have done. Unquestionably it must require a *majority* to do this, and hence the objection, that without forms of law, two Conventions may meet at different places, and make conflicting constitutions and thus lead to anarchy, has no foundation in possibility, and is to be treated only as one of those "little ill-timed scruples for adhering to ordinary forms," of which Mr. Madison speaks, "that are no where seen except in those who wish to indulge, under this mask, *their secret enmity to the substance contended for*," viz. the real, living sovereignty of the people !

Of the same stamp is the objection that the consequences of this doctrine are destructive, and that the power cannot exist in exercise, consistent with "law and order" and good government. And it is said that if the majority can change government at their pleasure, they can do anything wicked, wrong or unjust.

This objection is hardly plausible. At best it is utterly anti-American, and for those among us, who, while professing to bow to the sovereignty of the people, thus really fear to *trust the people*, there is no remedy, but to take the power from the people, if they can, and "found government on property," or the "divine right of kings." In short, this objection goes to the foundation of popular government. "All our political experiments (says Mr. Madison) rest on the capacity of mankind for self-government. It seems to have been reserved to the people of this country to decide, by their conduct and example, the important question, whether societies of men are really capable of establishing good government, from reflection and choice, or whether they are forever to depend for their political constitutions, on accident and force."

On the other hand the pretended conservative theory that "it is the part of wisdom to found government on property," and that the organized government is the guardian of the people, furnishes no security, no barrier against the people if they choose to act against government, for it has no bayonets to support it here, no guaranties but the wish and the will of the majority. Hence the principle of a peaceful change of government is the only safeguard in popular institutions.

If we say that the people cannot be trusted with this power, because they may abuse it, what is this but to deny not only their sovereignty, but their capacity for self-government ?

And who talks of *abuse* ? Is it the kings or the servants of the people ? Are the people less to be trusted in the exercise of their sovereign power than their agents in the exercise of delegated power ? In a word, if the objection is valid, that popular sovereignty cannot exist without tumult, anarchy and violation of law and order, then popular sovereignty cannot exist at all, and destroys itself.

It is not so. The whole history of our institutions repels it. Order, the love of law, and the sovereignty of the people go hand inhand together, and support, and sustain each other.

Neither is there any force in the invocation by our opponents of State rights against the rights of the people of the States ; a suicidal appeal, upon its very statement. We stand upon the highest State right, the power that alone makes States. They seek to destroy the State sovereignty by repressing the sovereignty of the people of every State. Nay, they annihilated the State itself, when, by a single act, they placed it under Martial Law, which is the absence of all law, and the presence of only a military despotism.

And whence comes this alarm for State rights ? From those, and those only, who have always invoked the largest implied and constructive powers of this Court and of Congress against State laws ; and well may the guardian of State rights doubt the sincerity of its new ally. Timeo Danaos, et dona ferentes!

The people of Rhode Island, in making a constitution without the consent of the Assembly, infringed no State rights and no State identity. The State remains the same ; it neither loses any of its rights, nor is discharged from any of its obligations. [Wheat. Inter Law, chap. 1, sect. 16.]

And there stood the State, the same as a sovereign State under the charter, the same under the People's constitution, the same under its subsisting constitution ; a political community of the whole people, not the strange formation fantastically described by the late Chief Justice Durfee of Rhode Island as " a self-subsisting corporation, resting on its own centre ! " Not so, but rather a self-sustaining people, or as better defined by Mr. Madison— " the State means the whole people united in one body politic ; and thus the State and the people of the State are equivalent expressions." [Fed. No. 39, p. 150.]

And this is the American answer to those who claim that the Legislature or the legal voters, and not the people, are the State ; for—

> " What constitutes a State ?
> Not high raised battlements or lofty towers,
> Not starred and spangled courts
> Where low-browed baseness wafts perfume to pride,
> No *men*, high-minded men,
> Men who their duties know,
> But know their rights, and knowing dare maintain."
>
> "And sovereign law, *that State's* collected will,
> O'er thrones and globes elate,
> Sits empress, crowning good, repressing ill."

The learned counsel (Mr. Webster) implies by his look the detection of a mis-quotation, and so it is, but designedly ; for this "sovereign law" that rules the earth is not as the original reads, "the *world's* collected will." Would to God it were. Then the groaning millions of the Old World would utter a voice before which thrones would crumble and dynasties dissolve. But never, never will that day come, if the people must stand still until the powers that be shall grant them an approved form of statute law to collect that sovereign will ; never, I trust, will this country, nor this Court, proclaim by acts or decrees, that such is the law of the New World.

And here I leave this great question, merely opened, after all the time I have occupied in tracing, as I best could, its principles, and citing its precedents. Upon my able colleague will devolve the task of applying those views, and meeting the objections, if any substantial can be raised by our learned adversaries, and that trust is safe in his hands.

Most respectfully thanking the Court for their indulgence throughout this lengthened argument, I will only add, that if this be the doctrine of American liberties, as applicable to the rule of decision in this cause, then the People's Constitution was the supreme law of Rhode Island, and the defendants are without plea of justification. If there be doubt on this question, then has the time come and now is, for these principles and precedents of our fathers, to be revived in the present and renewed to succeeding generations, for a new adjudication upon the tenure and meaning of American liberties; for as was aptly said in another place, "the glorious experiment which we are trying in this country would prove a total failure, if we should now decide that the people, in no situation, and under no circumstances, can hold a Convention without the previous consent of their own Legislature."

Upon such a construction, judicial or political, free institutions would have receded and not advanced among us, and the Revolution of Seventy-Six would remain to be revolutionized ! In any event, and whatever may be the final disposition of the issues raised upon the record, it cannot be apprehended that it will ever be promulgated from the highest judicial tribunal in this land, that, after all, the sovereignty is not in the people, practically, effectually and actively, as well as in mere form and theory ; and in that confidence I submit the cause to the country and the Court over whose destinies and decisions a wise and beneficent Providence has hitherto presided in all things for good.

THE FOLLOWING AUTHORITIES, SUSTAINING THE ARGUMENT, MAY BE REFERRED TO:—

On the Rule of Decision.

2 Dallas, 304. 3 Wash. C. C. Rep., 313.
1 Bald C C. Rep , 74. 1 Wheaton, 121.
1 Pet., 340. 6 Pet , 291, 515.
9 Pet., 607. 4 Wheaton, 256. 6 Cranch, 87.
12 Wheaton, 370. 2 Pet., 657 9 Danes Ab. App., 25, 52.
See cases collected on decisions affecting States, some of great delicacy—2 Condensed Rep , 325. 6 Ibid, 575.

As to Jurisdiction, affecting States.

Art. 3d, 2 Sect., United States Constitution.
1 Wheaton, 304 9 Wheaton, 904.
Sergeant's Con. Law, 43. 8 W., 1.
5 Cranch, 57, 61, 115.
3 Dall , 411. 4 Dallas, 12, and cases collected in Peters's Condensed Rep., note 170.

Political Power to recognize States.

3 Wheaton 643. 7 Wheaton, 335.
4 Cranch, 241. 10 Wheaton, 431.
2 Pet., 253. 12 Pet., 511, 657.

OPENING ARGUMENT FOR THE PLAINTIFFS ON MARTIAL LAW.

The Defendants' Plea must fail on the ground of Martial Law.

This point remains to be considered. I rely for its full development upon my learned friend and associate in the close, but it cannot, with propriety, be omitted in the opening, notwithstanding the time that has been occupied on the higher considerations involved in these causes, for it may happen that on this issue the practical decision of the Court may depend.

The case of Rachael Luther vs. Borden and others, in which the points on Martial Law are more minutely set forth, comes up here upon a certified division of opinion between the Circuit and District Court Judges. That case was once tried before the late Judge Story, and resulted in a disagreement of the jury.

The facts appearing upon the record are, that on the 25th day of June, 1842, the Charter General Assembly of Rhode Island passed an act declaring the State under Martial Law. That on the 29th of the same June the defendants, as military men, broke into the house of Martin Luther, under an alleged military order to arrest him, and there committed the trespass complained of, upon the plaintiffs.

The question, applicable to both cases, is, whether, admitting for the purposes of the argument, that the Charter Assembly was the law-making power, was this act of military violence justifiable under the plea of Martial Law?

The defendants, in their offerings of proof below, sought to put it on the ground of a sort of belligerent right, as existing in a state of war, and between the regular army of the State and hostiles; and hence their offer to prove that the town of Warren was in danger of being besieged, and that Martin Luther had appeared in arms against the Charter Government. But the defendants are driven from this position by the palpable fact that, under our constitutions, war in a State of this Union cannot exist between parties of its own people, and can only exist in any State as a war against the United States as well as a State, the United States being the sole war-making power.

Belligerent rights can only appertain to parties competent to declare and make war upon each other. In a State of this Union there can never be, at the same time, but one government which is recognized by the United States and by the courts of law, and hence all opposing the rightful government are in a state of insurrection or domestic violence, and are to be so regarded by those called upon to enforce the laws, and are not to be treated with as enemies under the law of nations. To justify the attempted seizure of the plaintiff as an act of *war*, would involve the absurdity of bringing in all the incidents of war between the two parties in Rhode Island, viz: exchange of prisoners, armistices, treaties of peace, and the like. As between *enemies*, the belligerent has a right to use every means necessary to accomplish the end for which he has taken up arms, (Wheaton's Nat. Law, chap 2, p. 249,) but it must be war with an "enemy State," and not a feud or domestic conflict between a State and its subjects. Bynkershoek, who gives, perhaps, the most perfect definition of war, says "it is a contest between independent Sovereigns, who are therefore entitled to pursue their own just rights by force or artifice." [Lee's Treatise on Captures in War, 2.]

The defendants' plea also fails on the facts, because the plaintiff offered to prove that there was no camp or military command in the town of Warren, and no persons in hostile array against the Charter Government, and that it was known two days before the breaking into the house of Martin Luther, that the troops assembled at Chepachet, twenty-five miles distant from Warren, in support of the People's Government, had been dismissed and had returned to their homes, and that all array or threatened conflict between the two parties was at an end. It was also shown that Martin Luther was not liable

to do military duty, and in no way subject to military law, and, at the time of the attempted seizure, was peacefully in his own house, and had committed no offence whatever, except the alleged political offence, under the Algerine act, of presiding as Moderator at a town meeting in Warren, under the People's Constitution. Upon these facts in the case, the plaintiff requested the Court to instruct the jury—

1. That the Legislature had no authority, under the charter or otherwise, to declare Martial Law, by a Legislative enactment.

2. That if they had any such power, the act was defective and inoperative, and gave no such summary power as that set up by the defendants.

3. That Martial Law, if it could have any legal existence in this country, must be a military power, exercised in a great emergency by the military commander, within the place of military occupancy and not a mere Legislative proclamation covering the whole territory of the State.

4. That in fact Martial Law has no place in the institutions of this country, except in the form of military law, under the articles of war.

On the other hand, the defendants asked for instructions that by force of the act of the Legislature, Martial Law was in force over the whole State and all the people thereof, and that any military officer had the right to exercise it at his discretion.

The Judges having divided on these points, the issue is brought here solely upon these matters of difference upon the record ; and this raises the grave question, whether the people of a State of this Union hold their liberties subject to the arbitrary power of the Legislature, to abolish all laws, and put the whole State under the control of a military despotism.

First, then, we deny that the Legislature of Rhode Island had the power to establish Martial Law over the whole territory and people of the State.

Such a power involves the right to suspend or abolish all laws. This can never appertain to a Legislature with delegated or defined powers. Hence all the old authorities, in treating of Martial Law, affirm that the power of declaring Martial Law is not a Legislative, but a prerogative power. [So it is considered and treated in 1 Hale's History the Com. Law, Edition of 1792, chap. 2, pp. 34 to 36, Edition of 1794, p. 54, and note E, 1 Tucker's Blk., ch. 13, pp. 412, 413; 4th do, chap. 33, p. 436.]

It can be exercised only by the King or his Lieutenant. [4 Jacobs' Law Dic , 259, cites Smith de Repub. Ang., lib. 2, c. 4.]

The command of the forces belongs to the King only, and Parliament ought not to pretend to the same. [7 Comyn Dig., p. 641. Title War, b. 6.]

This power of Martial Law, therefore, as it formerly existed in England, was a strictly military power, inherent in the King as generalissimo or the first in military command within the kingdom. [1. Blk. Comm., part 1, p. 262, by Judge Tucker, chap. 8, Prerogative. Edition 1803. Also notes pp. 237, 239, 240.]

Now if this be a prerogative power, a special right of pre-eminence, it can only appertain to sovereignty. Hence the sovereignty in England being in the Parliament, it is laid down in 5 Comyn Dig. Tit. Parliament H, 23, p. 229, that "Martial Law cannot be used in England without the authority of Parliament."

But even this does not mean that Parliament by a word could put the whole realm under Martial Law, but that it may authorize, by proper forms of law, the military organization to use the Law Martial, and this is now done *annually* in the British Parliament, by passing what is called the Mutiny Act, to which the rules and regulations for the army and navy of the United States substantially conform. [1 Blk Com., b. I, chap. 13, p. 415] This is the only Law Martial known or recognized in England. [2 Steph. Com., 600.]

Applied to the Charter Assembly of Rhode Island, the question recurs, where did they get this prerogative of sovereignty to enact Martial Law ?

1. They never derived it from the Charter of Charles 2d. The power of using the Law Martial was then regarded as a prerogative power, and it was expressly conferred by that Charter, not on the Governor, Assistants or Deputies, but solely upon the military officers, by the Governor and Company nominated, constituted and appointed.

This is very conclusive, on turning to the Charter, which, divested of its verbiage, and excluding what is merely parenthetical, reads thus :—

"And we do further give and grant unto the said Governor and Company, that it shall and may be lawful for the said Governor [*or in his absence the Deputy Governor and major part of the Assistants, at any time when the General Assembly is not sitting*] to nominate, constitute and appoint so many commanders, governors and military officers, as to them shall seem requisite, for the leading, conducting, and training up the inhabitants in martial affairs—And that it shall and may be lawful to and for all and every *such* commander, governor and military officer [*that shall be so as aforesaid, (or by the Governor, or in his absence by the Deputy Governor and six of the said Assistants and major part of the freemen of the said Company present at any General Assemblies) nominated, appointed and constituted*] according to the tenor of *his* and *their* respective commissions and *directions*, to assemble, exercise in arms, martial array, and put in warlike posture, the inhabitants of the said Colony, for their special defence and safety [*and to lead and conduct the said inhabitants, and encounter, expulse, expel, &c., and also to kill, slay, destroy, &c. all and every such person as shall at any time hereafter attempt*

or enterprize the destruction, invasion, detriment or annoyance of the said inhabitants or Plantation] AND TO USE AND EXERCISE THE LAW MARTIAL IN SUCH CASES ONLY AS OCCASION SHALL NECESSARILY REQUIRE."

Here the use and exercise of the Law Martial is expressly granted, not to the Assembly, but to the military officers, according to the tenor of their respective commissions and directions.

Under the Charter, therefore, the Assembly could not declare Martial Law, and, at most, could only, by specific directions, authorize military commanders, regularly appointed, to use and exercise the *Law Martial.*

What this "Law Martial" was, and its distinctness from this no-law called Martial Law, we shall presently see.

Plain it is that the Legislature of 1842, in declaring Martial Law, and prescribing no mode of action nor what it meant, nor who should execute it, transcended all power given them in the Charter of 1663.

2. After the Revolution the sovereignty devolved upon the people, and if this prerogative of sovereignty existed at all, it was in the people. Now, so far from delegating any such form of despotism to the Legislature, it was expressly denied to them by the Rhode Island Bill of Rights, adopted by the Convention of June 16, 1790, before cited, which adopted the Constitution of the United States, and affirmed these fundamental principles:—

1. "That no freeman ought to be taken, imprisoned or disseized, &c., or in any manner deprived of his life, liberty or property, but by the trial by jury, or by the law of the land."

2. "That every *person* has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property."

3. "That the people have a right to bear arms—that the *militia* shall not be subject to Martial Law except in time of war, rebellion or insurrection—and that at *all* times the military should be under strict subordination to the civil power" [Leg Documents and Charter, p. 46.]

So that *none* but the *militia*, and they only in time of war, rebellion or insurrection, could be *subject* to Martial Law.

And so declared the Constitution of the United States, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

It follows, then, that Martial Law never could become "the law of the land" Nor was the power of declaring Martial Law conferred upon either of the Colonies, by any of their charters, and if not found in the Charter, and never delegated by the people of Rhode Island, how came this sovereign and despotic power in the hands of the General Assembly? especially *against* the Bill of Rights of 1790, and the Constitution of the United States!

Second. We contend, that even admitting all power to have been in the Assembly, they never enacted that sort of Martial Law which is set forth in the defendants' plea of justification, and therefore the plea fails.

The plea must be taken strictly, and hence the only points of division here are raised on these matters where the facts are not traversed. Now the allegations in the defendants' plea, that large bodies of men were assembled in arms or were making *war* upon the State of Rhode Island—that Martin Luther was aiding therein, that there was any necessity for arresting him by military instead of civil process, or that any command from a superior officer was ever given to arrest him, are all traversed and denied by the plaintiff upon the record. [See pp. 17, 18, of Record. Fourth and fifth points.]

The plaintiff there offered to prove that when the trespass was committed there was no camp or military company in the town of Warren; that the only point at which men had been assembled in arms was twenty-five miles distant from said Warren, and that it was known to the defendants that they had dispersed and all military array had been disbanded two days before the trespass. That Martin Luther had committed no act against the Charter Government, except to preside as Moderator, April 18, 1842, which, if at all punishable, was so by civil process—that said Luther was not liable to do military duty, and therefore was exempt from enrolment or service—that there were civil magistrates in Warren, with ample power to arrest said Luther on civil process, and that no exigency whatever existed requiring any aid of Martial Law to execute a civil process.

This, then, must be taken as the state of facts, and the question is, whether by law the defendants can justify their breaking into the house of Luther at midnight, and assaulting his mother and driving her, undressed, from her bed.

They claim to have committed this wanton violence solely by force of what they call Martial Law. They derive their authority from an act of the Legislature, and from the order of one John T. Childs, the commander of a militia company, in which they were enrolled.

This renders it essential to consider what the law is under which they justify, and how John T. Childs came to have this despotic power over the civil laws.

First, then, what did the Legislature enact?

The act was entitled "an act establishing Martial Law in this State." "Be it enacted, &c., that the State of Rhode Island and Providence Plantations is hereby placed under *Martial Law*, and the

same is declared to be in full force until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State."

This was the whole act. It gave no definition of Martial Law, and prescribed no form of proceeding, and empowered no officers to carry it into effect.

We must, then, go out of the act to ascertain the extent and limitation of the term "Martial Law." As in construing an act punishing murder, we must go out of the enactment for the definition of the crime of murder.

Where shall we find this Martial Law? It is a thing distinct from *military* law. That relates to the government and discipline of the army and navy, and is a well defined military code, for the trial of military offences, by Courts Martial, in peace or war. In peace, the military code prescribed by statute in every State governs military men and limits their powers entirely subordinate to the civil authority. In time of war, the militia of the States called into actual service are subject to the articles of war prescribed by Congress, which constitute the military law distinct from the civil. Under none of these do the defendants justify. They set up a right for any subordinate military officer, at his own will and pleasure, to send a file of soldiers to break into any citizen's house at midnight and seize him without process of law. This is military lynch law, the absence of all law, and the reign of unlimited despotism. Can such a state of things exist in any of the States of this Union, and be recognized by courts of law as a justification for the violation of all law?

It is no answer to say that every State has an inherent right to preserve itself, and therefore may abolish all laws but the law of force; for that would be to contend that a State may destroy itself.

If this is the definition of the term "Martial Law" as enacted by the Rhode Island Assembly, it involves the monstrous absurdity that a Legislature, by two words, may place itself and all the people of a State under a military despotism. Thus the Legislature of Rhode Island, if this be the construction of their act, by putting the whole territory under Martial Law, did not leave themselves a foot of ground to stand upon, and any military commander might have entered their chamber with a file of soldiers and seized all the members with impunity. He might have invaded the courts of law, and sent every Judge to prison. His only warrant to justify him, suspicion—his sole authority, his own arbitrary discretion

Had the Governor, the Speaker, or the Chief Justice, been seized by the defendants upon the assumed order of any corporal or petty quartermaster in Rhode Island, the plea of Martial Law would be as complete a defence in a plea in bar as it is in the cases of Martin and Rachael Luther. Probable cause, excess, would be all that would be left to the jury in either case.

To establish Martial Law, then, in the sense contended for in these pleas, is to create a Dictator, the worst resort of the Roman republic. Nay, worse than that; for in Rome there was but one tyrant, while in Rhode Island every man with an epaulette was created a military despot. So, too, the Tribunes were not under Martial Law in Rome; but in Rhode Island, the Legislature, the courts, and every man's domicil were at the mercy of armed robbers.

The first Dictator was chosen in the war against the Latins. The plebians refused to enlist unless they were discharged from their debts to the patricians; the Consuls could not raise forces, and the Senate created a Dictator, with absolute power, for six months; but he generally laid down his office the moment tranquillity was restored. He could proclaim war, levy forces, and during his administration all other officers except the Tribunes of the people were suspended, and he was master of the republic. The result of this was the final usurpation of a perpetual Dictatorship by Sylla and Cæsar, and so ended Roman liberties.

Surely the courts of this country, and above all this tribunal, will pause long before they will countenance this precedent. And is it any less than this, to uphold the defendants' plea?

The Rhode Island act put the whole State under Martial Law. What was that? Let us consider first the British authorities.

What was Martial Law in England before the Bill of Petitions in 1628, *and what was it when the Rhode Island Charter was granted in* 1663 ?

Cowell's Interpreter, London Edition of 1637, title Martial Law, defines it to be "the law that depends upon the voice of the King or the King's lieutenant in *warres;* for howbeit the King, for the indifferent and equal temper of lawes to all his subjects, doeth not in time of peace make any lawes but by the consent of the three estates in Parliament, yet in *warres,* by reason of the great danger rising of small occasions, he useth absolute power, insomuch as his word goeth for lawe; and this is called Martial Lawe."

Blackstone, in his Commentaries, quoting Sir Matthew Hale, defines Martial Law to be no law, but the suppression of all laws. [1 Com., 413.]

And in 1 Hale's History of the Common Law, p. 54, chap. 2, it is said, "touching the business of Martial Law, that it is in truth and reality not a law, but something indulged rather than allowed as a law."

4 Jacobs' Law Dict., title Martial Law, it is said "this power (concerning Martial Law) is now regulated by act of Parliament." [See title Court Martial, 1 Jacobs, 154] "A proper distinction should be made between Martial Law, as formerly executed entirely at the discretion of the crown and unbounded in its authority either as to persons and crimes, and that at present established (since Charles 1,) which is limited with regard to both. Courts Martial are at present held by the same authority as the other courts of judicature of this kingdom."

Now this exploded Martial Law is the no-law set up in the defendants' plea, and this Martial Law, I shall prove, was abolished in England in 1628, and never existed in the Colonies, States, or United States of America.

In the 3d year of Charles 1st, 1628, was established the "Petition of Right," "concerning the rights and liberties of the subjects," second only to the Great Charter of the liberties of England. It was set forth in that petition "that divers commissioners, under your Majesty's great seal, have issued forth, by which certain persons have been appointed commissioners, with power to proceed within the land, according to the justice of *Martial Law*, against such soldiers and mariners, or other dissolute persons, as should commit any murder, felony, mutiny or misdemeanor whatsoever, and by such summary course and order as is agreeable to *Martial Law*, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and then cause to be executed and put to death, *according to the Law Martial*—They do therefore humbly pray that the aforesaid commissioners for proceeding by Martial Law may be revoked and annulled, and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, lest by color of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land."

And this the King solemnly granted and re-affirmed in full Parliament, June 7th, 1632. [See Care's English Liberties, Edition of 1774, pp. 153, 154.]

And this was followed by the Habeas Corpus Act 31, Charles 2, chapter 2.; ibid, p. 183.

Here was an end to "Martial Law" in England, and hence it is clear, that at the date of the Rhode Island Charter in 1663, and at the passage of the act of June 25, 1842, declaring Martial Law, no such law existed or was known in England

Thus says Hale, in his History of the Com. Law, Edition of 1792, chapter 2:—

"The necessity of government, order and discipline in an army is that only which can give those laws a countenance. Secondly, this [Martial Law] was only to extend to members of the army or to those of the opposite army, and never was so much indulged as intended to be exercised upon others. For others who were not enlisted under the army had no color or reason to be bound by military constitutions, applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, *though it were in a time of war.*"

Mr. Stephens, in his Commentaries on English Laws, says—

"Martial Law may be defined as the law (whatever it may be) which is imposed by the military power, and *has now no place in the institutions of this country*, (unless the articles of war, established under acts by which the sovereign is empowered to make articles of war, which shall be judicially taken notice of) be considered of that character. The Court of Chivalry, which had once jurisdiction over life and members in matters of arms, [4 Inst., 1—3; 2 Hawk, 5—9,] has been long disused, and though our sovereigns formerly exercised the right of proclaiming Martial Law within the kingdom, that prerogative seems to be now denied to them by the Petition of Right, which enacts that no commissioner shall issue, to proceed within this land, according to Martial Law." [2 Steph. Com., 602, n. c., Amer. Ed. of 1843.]

Another authority entirely settles this question. [2 Henry Blackstone, 69—Grant vs. Sir Charles Gould and others in 1792.] This case arose on a motion for a prohibition against the sentence of a Court Martial passed against the plaintiffs. The only point material is the view taken of Martial Law, as distinct from military law. The argument of Sergeant Marshall, in pp 83, 86, well defines this distinction, and shows that none but soldiers can be tried by Martial Law, and that this law, as it then existed in England, "was the mere creature of the annual mutiny act, and had not the smallest shadow of authority but what it derived from that act." Lord LOUGHBOROUGH, in giving the judgment of the Court, says—"that Martial Law such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where Martial Law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called *Martial Law*, merely because the decision is by a Court Martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, *and which has been for a century totally exploded.*"

And he adds, "therefore it is totally inaccurate to state Martial Law as having any place whatever within the realm of England." [pp 98, 99.]

[See also 1 McArthur on Court Martial, chap. 2; Samuel's Military Law, Ed of 1816, preface 11, and p. 15. And to the same point Adye, chap. 1, Simmonds, and all the approved English treatises on this subject.]

If precedent is to govern, then there is an end to all such power in the Rhode Island General Assembly under English common law, as is set up in the defendants' plea.

The question then recurs, what was the legal meaning of the term "*Martial Law*," in the act of the Rhode Island Assembly. This point was not touched by the opinion or rather the hasty suggestions, *nisi*, thrown out by the late Mr. Justice Story, when he tried this case below and the jury disagreed. It is, therefore, a new and open question. Had it occurred to him, I think he would have given it a wiser consideration.

The answer is, that *Martial Law* in this country can only mean *military law* for the discipline and government of the army and navy, through the forms of trial by Courts Martial.

A distinguished American jurist, Edward Livingston, in his opinion as to Martial Law, given at the request of his friend, General Jackson, in relation to the proceedings at New Orleans, says, "on the nature and effect of the proclamation of Martial Law by Major General Jackson, my opinion is, that such proclamation is unknown to the constitution and laws of the United States That it is to be justified only by the necessity of the case, and that therefore the General proclaims it at his risk and under his responsibility both to the government and to individuals. When the necessity is apparent he will meet reward instead of punishment from his government; and individual claims for damages must be appreciated by the same rule, under the discretion of a jury. Should they, in the opinion of the government, decide falsely against their officer, they have a right, which they have frequently exercised, of indemnifying him for the disinterested responsibility he has assumed."

That distinguished commander, General Jackson, acted under this high responsibility in proclaiming Martial Law within the camp at New Orleans in 1815, and he most honorably admitted that responsibility and his amenibility to the civil law, by submitting to the jurisdiction of Judge Hall, and the payment of the fine imposed upon him. He did not set up the Rhode Island plea in justification, by claiming supremacy of the military over the civil power, but having preserved his country by assuming a great responsibility, he preserved her laws also by submiting to the jurisdiction and the penalty. A grateful country indemnified him by restoring the fine, and thus the honor of the General and the sacredness of the laws were both maintained inviolate. [See Democratic Review for Jan., 1843, p. 70. Article, Gen. Jackson's fine.]

This is the only instance in the history of this country of a declaration of Martial Law, previous to the Rhode Island case. And no court in the land has ever held Martial Law as a plea in justification.

To this point I cite Johnson vs. Duncan and others, 3 Martin's Louisiana Reports, 551, where it was held, that a military officer cannot by a declaration of Martial Law suspend judicial proceedings in the district under his command. Chief Justice Martin, in giving the opinion of the Court upon the legal force and effect of the Martial Law, proclaimed by General Jackson in New Orleans, cites Grant vs Gould, to show it did not exist in England, and he adds, "that even the law defined by Hale and Blacks one was confined to military persons, while the Martial Law contended for would extend to *all* persons and dissolve, for a while, the government of the State. This could not be, because according to our laws, all military events are under constant subordination to the ordinary courts of law." [p. 536.] "The Court then proceeded, to consider, how Martial Law ought to be understood among us, and how far it introduces an alteration in the ordinary course of government. To have a correct view of Martial Law in a free country, examples must not be sought in the arbitrary conduct of absolute government. In a republic, where the constitution has fixed the extent and limit of every branch of government in time of war as well as peace, there can exist no thing vague, uncertain or arbitrary in the exercise of any authority." [p. 549.] "The proclamation of *Martial Law*, therefore, cannot have had any other effect than that of placing under military authority all the citizens subject to militia service. It is in that sense alone that the vague expression of Martial Law ought to be understood among us. To give it any larger extent would be trampling upon the constitution and laws of our country." [p. 551.]

To the same point is the opinion of Judge Bay, of South Carolina, in 1814, in Lamb's case, reported in the South Carolina Law Repository, p. 330.

Opinion of Chief Justice Marshall, in 1813, in Mead vs Deputy Marshal. Mead was arrested for non-payment of a fine imposed by a State Court Martial in time of war, for refusing to take the field under the general order of March 24, 1813. Held that the proceedings were void, because the Court Martial was not constituted by any law of the State. [Law Reports, p 329.]

Now it must follow, from all American authority and precedent, that a Legislative act declaring Martial Law either has no meaning in courts of law, or is applicable only to enforcement of the military law of the State, establishing Courts Martial for the discipline and government of the militia.

This is confirmed by the history of the country. By the Constitution of the United States, Congress has power "to make rules for the government and regulation of the land and naval forces." This has been done by acts of Congress.

Congress also has power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, to provide for disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the States the appointment of officers; and Congress shall also protect each of the States against invasion and domestic violence."

The laws passed under these powers cover all the cases that can exist in the States for the exercise of Martial Law, except the suppression of riots, where, by State laws, the military are called in only in aid of the civil authorities, when insufficient to enforce the execution of the laws.

Admitting, then, for the argument, that the Charter Government in Rhode Island had a right to put down the People's Government by force, what was the condition of things in that State at the time of the trespass?

It was either war, insurrection, invasion or domestic violence.

If it was war or invasion, it involved the United States, and not merely Rhode Island. War cannot be made upon a single State without being made against the United States. "No State shall, without the consent of Congress, engage in war, unless actually invaded or in such imminent danger as will not admit of delay." If Governor Dorr made war on Rhode Island or invaded it, he made war on the United States.

But it was no war or invasion, because it was a contest between citizens of the same State, both portions claiming to be the government of the State, and acting under its laws and constitution. It was not insurrection as against the United States, and if insurrection against the State, then it was at most a case of "domestic violence," and hence the laws of the United States, and not the power of a State to make war or proclaim Martial Law governed the case.

In fact the Charter Government of Rhode Island have concluded themselves on this point, for they had applied to the President as in a case of domestic violence, and he had promised to interpose all the force of the United States, whenever the civil power of the State should prove insufficient to enforce the local laws.

What right, then, had the State to interpose this anomalous system of lawless military violence, known as Martial Law, which had been exploded in England for two centuries, and was never before resorted to in the United States or any State of the Union?

Precedent is also conclusive here. There have been but two occasions under the constitution for the government to call out the militia to suppress insurrection or domestic violence or repel invasion. First in Pennsylvania, in the whisky insurrection in 1794, and again in the war of 1812. [5 Marshall's Life of Wash., chap. 8, pp 576 to 592.]

In neither of these cases was the old exploded Martial Law thought of by Congress or the State Legislature. In the insurrection in Pennsylvania, after the civil power had proved insufficient, the military was called out, but only in aid of the civil power President Washington deputed commissioners to attempt the peaceable conciliation of the insurgents, two proclamations were issued, and when resort to force became indispensible, the President accompanied the troops into the disaffected districts and directed their movements merely to aid in suppressing opposition to the service of civil process, and to enforce the execution of the laws. [2 Marshall's Life of Wash, 343]

And so in Shays' rebellion in Massachusetts, under the confederation; Governor Bowdoin and the Massachusetts Legislature never dreamed of Martial Law, but they called out the militia to aid the civil officers and courts in executing the laws, and in that capacity put down the rebellion.

Now the American doctrine to be extracted from all our history and all our precedents is, that the military power is only to be called in to aid the civil power when the latter is insufficient to enforce the laws; that in short it is to be used, not as an army to make war and conquest and outride all law, but as an armed posse comitatus, to preserve the laws

Then test the plea of the defendant by this rule, and where does it stand? The pleadings and offers show that the civil magistrates were at hand and no resistance had been offered to them That there was no resort to civil process, but a reckless order by a subordinate military officer to break into a citizen's house at midnight, without warrant, without process and without law.

To justify such an act, which is against all the constitutional securities of the citizen, which was against the Bill of Rights of Rhode Island, there should be the plainest enactment of law, and the utmost precision in the powers it confers and the mode of its execution.

Instead of this, the plea shows simply, "*be it enacted, the State of Rhode Island is hereby placed under Martial Law!*" No officers are appointed to execute it, no definition of the offences cognizable under it, no limitations or restrictions; and there could have been just as well defined a law enacted by the Assembly, if, instead of *Martial Law*, they had declared that the State was put under *the reign of terror*; and that every man had a right to seize and arrest every other man in Rhode Island!

Here then the plea fails by the utter indefiniteness and want of certainty in the law. Where is the standard by which to test the acts of the defendants and show that they conform to Martial Law, to any law existing or that ever existed in Rhode Island or elsewhere?

And if we go back to the exploded Martial Law before the Bill of Petition, the plea fails even then, for it no where sets forth that John T. Childs, who gave this order to the defendants, had any authority to give it. I pray the court to notice this manifest defect in all the pleas. The offer to show that Col Turner gave a general order to arrest suspected persons cannot avail, because it is not in the pleadings and makes no part of the issue. The whole authority the plea sets forth is the order of John T. Childs, the commander of a company of infantry in which the defendants were *enrolled*. It is not even alleged that he or they were in the service of the State, or in any service.

In conclusion, then, may it please your Honors, of this long and elaborate, but I trust not unprofitable investigation of a subject and a cause so deeply involving all the great issues of American liberties, I appeal to this honorable court, as in the presence of the whole people, shall a decree go forth sanctioning this plea in justification of the wrongs and outrages needlessly committed against the rights of person and the rights of domicil, under this undefined despotism of exploded Martial Law! Or shall a new security be given to the permanency of free institutions by a reassurance from this exalted tribunal, that no civil right of a citizen shall be violated with impunity but upon plain and well-defined matter of law; and that there is a substantial legal meaning in that clause of the Great Charter which affirms here, as well as in England, that "no citizen shall be put out of the protection of the law, or deprived of life, liberty or estate, but by the judgment of his peers or the law of the land?"

NOTE.

While this argument has been passing through the press, the French republic has been proclaimed "in the name of the sovereignty of the people," and with the heart of continental Europe has repudiated the despotic doctrines of the Holy Allies at Laybach, that reforms in government can only emanate from the will of the sovereign whom God has entrusted with power! Surely young America will not now consent to take up this cast off garment of deposed kings!

The infamous treaties of Vienna of 1815, which for thirty years bound the millions to hereditary despotism, have been scattered like chaff by the breath of the people, and in that same capital, where the Emperor of Austria had proclaimed as his standard of progress, that he wanted not learned men, but obedient subjects, the people as sovereign now demand as a right, and the obedient Emperor, Emperor only in name, receives, instead of grants, free constitutions of government; thus saving his crown only by doffing it in the presence of the people.

Instead of the Circular of the Holy Allies of 1821, affirming that kings only can grant government, we have the splendid paper from Lamartine, the liberal head of the Provisional Government of France, proclaiming to the world that revolutions are no longer to be made by the people for the benefit of dynasties but for themselves.

In such a crisis, and when we are in danger of falling back in progressive freedom from the failure of the cause of the people of Rhode Island, or the faltering of the Judiciary in sustaining these great principles that lie at the foundation of true government, it cannot be inopportune to present in this form, gathered from numerous volumes not conveniently accessible to the people, the lessons on government here drawn from the highest and purest sources of the wisdom and patriotism of the great republican Fathers.

In this I claim only the merit of patient investigation and thorough research, and I cannot omit the pleasant duty of acknowledging the aid I have received in that labor from the faithful co-operation of my friend GEORGE TURNER, Esq., of Newport, R. I., who was originally associated with me as counsel in these causes, but whose ill health deprived the parties of his more immediate services.

TO THE YOUNG MEN OF AMERICA I respectfully dedicate these pages. It will rest with them, as the future masters of the republic, to decide whether on the foundation of these great truths popular government shall go onward and upward, progressive in "liberty, equality, fraternity," in the development of the principles of American freedom as expounded by its founders, or whether it shall, under adverse influences, recede until another half century shall find regenerated Europe so far in advance of America as to require a greater struggle to reach her, than she is now making to come up with us in the practical sovereignty of the people.

B. F. H.

Boston, 1848.